MAY 2 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-1642

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PLATO E. PAPPS
LOUIS P. POULTON
1300 Connecticut Avenue, N.W.
Washington, D.C. 20036

BERNARD DUNAU
912 Dupont Circle Building, N.W.
Washington, D.C. 20036

ALFRED M. KLEIN
ROBERT M. SIMPSON
727 West 7th Street
Los Angeles, California 90017

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statutes Involved 2

Statement 5

I. The Facts 5

II. The Decision and Order of the National Labor Relations Board 11

III. The Decision of the Court of Appeals 13

Reasons for Granting the Writ 13

Conclusion 25

Appendices 1a

AUTHORITIES CITED

Cases:

Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 .....13, 14, 16, 17, 19, 22-23, 25

Centlivre Village Apts., 148 NLRB 854 23

Local Union No. 25, Teamsters v. N.Y., N.H. & Hart. R.R. Co., 350 U.S. 155 .....13, 15, 25

Local 1976, Carpenters v. N.L.R.B., 357 U.S. 93 19

Meat & Highway Drivers, Local Union No. 710 v. N.L.R.B., 335 F.2d 709 24

Page

National Woodwork Manufacturers Assn. v. N.L.R.B., 386 U.S. 612 ..... 19, 21

N.L.R.B. v. Servette, 377 U.S. 46 18

Northeastern Indiana Bldg. & Construction Trades Council v. N.L.R.B., 352 F.2d 696 23

Order of Railroad Telegraphers v. Chicago and Northwestern R. Co., 362 U.S. 330 16

STATUTES:

Labor Management Relations Act, 1947, Title II, § 212 15

National Labor Relations Act, 28 U.S.C. § 151:

§ 2(2) 3-4, 5, 11
§ 2(3) 4, 11
§ 8(b)(4)(A) 4, 18, 19, 23
§ 8(b)(4)(B) 4, 5, 12, 18
§ 8(e) 2, 4, 10, 11, 12, 16-17, 18, 19, 20, 21, 22, 23, 24
§ 10(1) 10

Railway Labor Act, 45 U.S.C. §§ 151-188, as amended, 49 Stat. 1189, 45 U.S.C. § 181 ..... 2, 13

§§ 2, First, Second, and Seventh; 5, First, First (a); 6; and 10 3
§ 201, Titles I and II 2, 5
§ 202, Title I 2
§ 206, 45 U.S.C. § 186 13

LEGISLATIVE MATERIALS:

80 Cong. Rec. 5411 (1936) 13
93 Cong. Rec. 6498 (1947) 14
105 Cong. Rec. 6556-58 (1959) 20
105 Cong. Rec. 14343 (1959) 21
105 Cong. Rec. 15891 (1959) 20, 23
105 Cong. Rec. 17899, 17919-20, 18153-54 (1959) 20
Hearings before the Subcommittee of the Senate Committee on Interstate Commerce on S.2496, 74th Cong., 1st Sess., 6, 8-9, 25-27 (1935) 14

Page

H. Rep. No. 741, 86th Cong., 1st Sess., 58, 60, 97 (1959). 20
H. Rep. No. 1147, 86th Cong., 1st Sess., 26, 27, 39 (1959) 20
H. Rep. No. 2243, 74th Cong., 2d Sess. (1936) 14
S. Min. Rep. No. 187, 86th Cong., 1st Sess., 79-80 (1959) 20
S. Rep. No. 105, 80th Cong., 1st Sess. 19 (1947) 15
S. Rep. No. 895, 74th Cong., 1st Sess. (1935) 14

MISCELLANEOUS:

38 N.M.B. Ann. Rep. 101-102, 103 17
Perlman, M., The Machinists: A New Study in American Trade Unionism, 3 (1962) 17

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

International Association of Machinists and Aerospace Workers, AFL-CIO, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on January 9, 1974 (*infra*, p. 41a).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 491 F.2d 367 (*infra*, pp. 35a-40a). The opinion of the National Labor Relations Board is reported at 197 NLRB No. 18 (*infra*, pp. 1a-33a).

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1974 (*infra*, p. 41a). A petition for rehearing was denied on February 7, 1974 (*infra*, p. 42a). A formal judgment was entered on April 19, 1974 (*infra*, p. 43a). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board is empowered to determine that an agreement violates the so-called "hot cargo" prohibition contained in section 8(e) of the National Labor Relations Act when that agreement has been entered into by an air carrier, excluded from the coverage of the National Labor Relations Act as a "person subject to the Railway Labor Act," and a union representing the air carrier's employees, excluded from the status of employees under the National Labor Relations Act as "individual[s] employed by an employer subject to the Railway Labor Act."

STATUTES INVOLVED

1. Section 201, Title II of the Railway Labor Act (45 U.S.C. §§ 151-188), provides that, except for the grievance adjustment procedure, Title I of that Act applicable to rail carriers is "extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, . . . and every air pilot or other person who performs any work as an employee or subordinate official of such carrier . . . ." Section 202 of the Railway Labor Act provides that the "duties, requirements, penalties, benefits, and privileges prescribed and established" by Title I, except for the

grievance adjustment procedure, "shall apply to . . . carriers by air and their employees . . . ."

The Railway Labor Act enumerates among its purposes "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions . . ." (§ 2). It makes it the duty "of all carriers . . . and employees to exert every reasonable effort to make and maintain agreements concerning" these subjects (§ 2, First). The National Mediation Board is at the center of the statutory settlement procedure in the case of "a dispute between an employee or group of employees and a carrier . . . concerning changes in rates of pay, rules or working conditions not adjusted by the parties in conference" (§ 5, First (a)). Thirty-days written notice of "an intended change in agreements" must be given (§ 6); negotiation of the intended change is mandated (§ 2, First, Second); mediation by the NMB is required if direct negotiation does not resolve the controversy (§ 5, First); if mediation is unsuccessful, the NMB must try to persuade the parties to agree to voluntary arbitration (*ibid.*); and failing these efforts, emergency board factfinding is available upon recommendation of the NMB and decision of the President (§ 10). During the pendency of every step in the proceeding, and for thirty days following its conclusion, the intended change may not be made unilaterally. (§§ 2, Seventh; 5, First; 6; 10.)

2. Air carriers and their employees are expressly excepted from the separate statutory procedure of the National Labor Relations Act (29 U.S.C. § 151). The latter Act provides that the "term 'employer' . . . shall not include . . . any person subject to the Railway Labor

Act" (§ 2(2)), and that the "term 'employee' . . . shall not include . . . any individual employed by an employer subject to the Railway Labor Act . . ." (§ 2(3)).

3. Section 8(e) of the National Labor Relations Act prohibits the so-called "hot cargo" agreement:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . . .

Excepted from this prohibition are the building and construction industry [1] and the apparel and clothing industry.[2] Section 8(b)(4)(A) of the National Labor Relations Act prohibits a labor organization from

---

[1] "*Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . ."

[2] "*Provided further*, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms 'any employer', 'any person engaged in commerce or in industry affecting commerce', and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer', 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception."

exerting economic pressure where an object is "forcing or requiring any employer . . . to enter into any agreement which is prohibited by section 8(e) . . . ." Section 8(b)(4)(B) prohibits the so-called secondary boycott. It makes it an unfair labor practice for a labor organization to exert economic pressure where an object is:

> forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . .

STATEMENT

I. The Facts

Lufthansa, an international air carrier of passengers and goods, exists under the laws of the Federal Republic of Germany, and operates to and from points within the United States and other countries throughout the world (R. 34). It is a "carrier by air" within the meaning of section 201 of the Railway Labor Act, and is not an employer within the meaning of Section 2(2) of the National Labor Relations Act (*infra*, p. 3a).

Lufthansa began air transportation in the United States about June 15, 1955 (R. 74). About November 1, 1959, it started its own food preparation and catering operations at John F. Kennedy International Airport in New York to service its flights originating at that point (R. 75). Food service for its flights originating at other points in the United States continued to be provided to it by independent caterers (R. 74).

On June 30, 1961, pursuant to the procedures of the Railway Labor Act, the National Mediation Board certified the International Association of Machinists & Aerospace Workers, AFL-CIO, (IAMAW), as the representative of Lufthansa's employees within the craft or class of Kitchen and Commissary employees (R. 75, 81, 102, 147). Beginning in 1961 the IAMAW and Lufthansa entered into a successive series of collective bargaining agreements covering this class of employees (R. 75-77). The agreements recite that they are "made and entered into in accordance with the provisions of Title II of the Railway Labor Act . . ." (R. 81, 102, 147). Article II(a) of the agreements provides that Lufthansa recognizes the IAMAW "as the sole and exclusive bargaining agent for all classes and grades of . . . [commissary employees] employed by the Company . . . working within . . . the United States . . ." (R. 82, 103, 148). Article II(b) provides that "All work performed by the Company involving the work of all classes and grades of . . . [commissary employees] is recognized as coming within the jurisdiction of the International Association of Machinists and is covered by this Agreement" (*ibid.*). Through the agreement expiring on July 31, 1970, Memorandum Of Understanding No. 6, appended as part of the agreements, authorized Lufthansa to subcontract commissary work in defined circumstances (R. 97, 120):

> It Is Hereby Mutually Agreed that the Union grants a waiver of Article II(a) and (b) of the Agreement between the Company and International Association of Machinists in the following instances:
>
> (a) Work historically performed prior to the date of signing of the Agreement
>
> (b) Where catering facilities are not provided;

(c) Where the work load is such that the facilities and or personnel are not sufficient to accomplish the work, provided that no lay-off results.

In the above instances the work may be contracted out.

As of January 1969, pursuant to this contractual leave, Lufthansa was provided with catering service at Los Angeles International Airport by Continental Air Lines, at Chicago and Boston by Marriott, and at other points outside New York by others (R. 36, 37, 59, 74, 75).

On October 21-22, 1969, Lufthansa and IAMAW entered into Memorandum of Understanding No. 10 (R. 75-76, 99-100). This memorandum provided that "During the period April 1, 1970 to December 31, 1972 or until the completion of the new catering facilities, whichever occurs sooner, B[oeing] 747 aircraft at JFK airport [at New York] will be catered by Chefs Orchid Caterers" (R. 99). The premise of this agreement was recited in its preface. "Lufthansa intends to operate B 747 aircraft on its North Atlantic routes by April 1, 1970"; "the present catering facilities at JFK airport are not sufficient to accomplish the catering of B 747 aircraft"; and "Lufthansa will provide new catering facilities at JFK airport by the end of 1972 to handle such aircraft" (R. 99). Accordingly, pending this event, catering of the B 747 aircraft at JFK would be furnished by Chefs Orchid (R. 99).

On November 30, 1969, Lufthansa discontinued its use of Continental Air Lines, and on December 1, 1969, it began to use Marriott Corporation, to furnish food service to Lufthansa flights originating at Los Angeles International Airport (R. 76). Continental's commis-

sary employees are represented by the IAMAW and their employment terms are fixed by a collective bargaining agreement between Continental and IAMAW (R. 75). Marriott's employees are unrepresented (R. 37). Lufthansa's termination of Continental's services caused the layoff of four employees by Continental (R. 42, 55). Disturbed by the loss of the four jobs, the IAMAW informed Lufthansa that it should correct the situation within two or three months, which Lufthansa understood to mean that it should arrange to utilize a union caterer (R. 55).

The 1967-1970 agreement between Lufthansa and IAMAW, expiring July 31, 1970, provided for "written notice of intended change . . . served by either party in accordance with the provisions of Section 6, Title I, of the Railway Labor Act . . . at least 60 days prior to the expiration date" (R. 118). Shortly after March 1, 1970, Lufthansa received the IAMAW's notice of "proposed changes" "as required by Section 6, Title I of the Railway Labor Act" (R. 76, 145). Among the changes sought by the IAMAW was to "Delete" the allowability of contracting out incorporated in Memorandum Of Understanding No. 6 (*supra*, pp. 6-7), and to substitute for it the requirement that: "Company to provide catering facilities on all points of the system (USA), all positions to be filled as outlined by the terms and conditions of this agreement" (R. 146).

Negotiations began in May 1970 and lasted through February 12, 1971 (R. 76). One of the principal issues was the IAMAW's insistence on its proposal that Lufthansa "provide catering facilities on all points of the system" with its own employees (R. 76-77). This issue was ultimately resolved and a collective bargaining agreement reached by adoption of a compromise (R.

77). Provision was made for (1) expansion by Lufthansa of its catering facilities at John F. Kennedy Airport at New York; (2) maximum utilization of its existing facilities at that point; (3) retention at that point of a prescribed minimum number of commissary employees in specified job classifications; and (4) engagement of "Chefs Orchid for the performance of that catering service" at that point which Lufthansa "is unable to perform in its own flight kitchen . . ." (R. 196-197). For those points outside of New York at which Lufthansa did not operate catering facilities, provision was made that (R. 198):

> The Company and Union agree where catering facilities are not provided, the Company may continue to farm out the work and shall engage the following caterers to perform its catering service at the following location:
>
> | LOCATION | CATERER |
> |---|---|
> | Los Angeles | Chefs Orchid |
> | Anchorage | Northwest Airlines |
> | Boston | Marriott |
> | Philadelphia | Ogden Foods (Berlo) |
> | Chicago | Chefs Orchid |

Finally, provision was made for Lufthansa to select a caterer "to perform catering service for scheduled flights at any other location" and to change a named caterer at an existing location who "fails to meet the Company's requirements as to quality, service or price . . ." (R. 198). For initial selection at a new location or for a change at an existing location, Lufthansa shall give IAMAW "sixty (60) days written notice" of its intention to select or change, and during that period the two "shall attempt to agree upon" a caterer (R. 198). In the event that they do not agree upon a

"Union caterer" within that period, Lufthansa "may then select a caterer of its choice" (R. 198). This new agreement concluded with the recital that it "supersedes all preceding memoranda between the Company and the Union pertaining to the Union's waiver of its exclusive work jurisdiction over the performace of catering services . . ." (R. 199).

Of the caterers named in the new agreement, the employees of Marriott are unrepresented, the catering employees of Northwest Orient Airlines are represented by the IAMAW, and the catering employees of the others are represented by "some labor organization affiliated with AFL-CIO . . ." (R. 37). Pursuant to the agreement, Lufthansa notified Marriott that it was terminating its services at Los Angeles on May 15, 1971, and at Chicago on June 1, 1971, and termination was effectuated at Los Angeles on May 15, 1971 (R. 38-39). However, based on charges filed by Marriott on March 19, 1971 (R. 34), the NLRB General Counsel on May 14, 1971, issued an unfair labor practice complaint against Lufthansa and IAMAW alleging that they had violated section 8(e) of the National Labor Relations Act by entering into, maintaining, and giving effect to their compromise agreement on subcontracting of catering work (R. 5-16). Meanwhile, pursuant to section 10(1) of the National Labor Relations Act, on May 12, 1971 the cognizant NLRB Regional Director sought, and on May 26, 1971 secured, preliminary injunctive relief requiring that, pending determination of the cause by the NLRB, (1) Lufthansa and IAMAW cease effectuation of the agreement as it pertained to subcontracting of work, (2) Lufthansa rescind its notice of termination of Marriott's services at Chicago, and (3) Lufthansa resume utilization of Marriott's services at

Los Angeles (R. 38, 200-203). Accordingly, in compliance with the temporary injunction, on June 25, 1971 Lufthansa resumed using Marriott to supply food services at Los Angeles (R. 38), and presumably it did not give effect to its notice of termination of Marriott's services at Chicago.

II. The Decision and Order of the National Labor Relations Board

The NLRB held, one member dissenting, that it "is empowered under Section 8(e) of the [National Labor Relations] Act to determine the lawfulness" of the subcontracting agreement between IAMAW and Lufthansa. It reached this conclusion despite the express terms of section 8(e) limiting its prohibitory reach to agreements between "any labor organization and *any employer* . . . ." By statutory definition Lufthansa is not an "employer" within the meaning of the National Labor Relations Act because it is excepted from that status as a "person subject to the Railway Labor Act" (§ 2(2)). By statutory definition Lufthansa's employees represented by IAMAW are not employees within the meaning of the National Labor Relations Act because they are excepted from that status as "individual[s] employed by an employer subject to the Railway Act" (§ 2(3)). Acknowledging the contrary import of "the seemingly clear language of Section 8 (e)" (*infra*, p. 9a), the NLRB nevertheless declined to give effect to the statutory definition of employer excluding from its scope "any person subject to the Railway Labor Act," and held instead that as used in section 8(e) the word "employer" has an unrestricted generic meaning. It reached this conclusion in exclusive reliance on its reading of the legislative history of

section 8(e) and of the secondary boycott provisions of section 8(b)(4)(B). (*infra*, pp. 9a-17a). Satisfied of its power to reach the question, the NLRB invalidated Lufthansa's subcontracting agreement with IAMAW on the ground that it "in effect requires Lufthansa to cease doing business with Marriott and contract only with union caterers" (*infra*, p. 9a).

In dissent, Member John H. Fanning observed that the majority's unrestricted reading of the term "employer" in section 8(e) brought within the prohibitory purview of that section entry into agreements "by railroads, airlines, the Federal and state governments and their political subdivisions, the Federal Reserve bank, wholly owned Government corporations, and nonprofit hospitals, all of which are excluded from the definition of 'employer' contained in Section 2(2) of the Act" (*infra*, pp. 23a-24a). He noted that the "language of 8(e) is itself clearly contrary to this holding . . ." (*infra*, p. 24a). And the legislative history, he concluded, confirms that plain meaning. For the "legislative history of 8(e) and of the 1959 amendments to the secondary boycott provisions of the Taft-Hartley Act demonstrate[s] . . . that Congress clearly understood that by the use of the words 'any employer' in 8(e) [it was] limiting the jurisdictional reach of the section to employers as defined in Section 2(2)" (*infra*, p. 24a).

The NLRB ordered Lufthansa and IAMAW to desist from enforcing their subcontracting agreement of February 12, 1971, or from entering into or enforcing any other agreement, whereby Lufthansa ceases or refrains or agrees to cease or refrain from doing business with Marriott (*infra*, p. 22a).

III. The Decision of the Court of Appeals

The Court of Appeals affirmed the Board's decision and enforced its order (*infra*, pp. 35a-40a). The Court of Appeals did not essay an independent inquiry into the statutory question, but deferred to the analysis of the Board, observing that "the experienced judgment of the Board is entitled to great weight on such questions of law and statutory interpretation" (*infra*, p. 39a).

REASONS FOR GRANTING THE WRIT

The Court of Appeals, affirming the position of the NLRB, has decided an important question of the respective reach of the Railway Labor Act (RLA) and the National Labor Relations Act (NLRA) in a manner which conflicts with this Court's decisions in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969), and *Local Union No. 25, Teamsters* v. *N.Y., N.H. & Hart. R.R. Co.*, 350 U.S. 155 (1956).

1. For a brief nine months subsequent to its enactment on July 5, 1935, air carriers and their employees were covered by the NLRA. But on April 10, 1936, coverage was transferred from the NLRA to the RLA,[3] and all cases pending before the NLRB involving air carriers and their employees were removed to the NMB to "be handled to conclusion by the Mediation Board."[4] The shift was made in order to subject labor disputes arising in air and rail transportation to the same statutory regime, and to bring to the settlement of labor disputes in air transportation the identical facilities of

[3] 49 Stat. 1189, 45 U.S.C. § 181; 80 Cong. Rec. 5411 (1936).

[4] RLA, § 206, 45 U.S.C. § 186.

mediation, voluntary arbitration, and emergency board fact-finding as prevailed in rail transportation.[5]

Labor disputes in air transportation are thus within the senior statutory scheme of the RLA. "The NLRA came into being against the background of pre-existing comprehensive federal legislation regulating railway labor disputes. Sections 2(2) and (3) of the NLRA . . . expressly exempt from the Act's coverage employees and employers subject to the Railway Labor Act." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 376 (1969). This explicit definitional exclusion was designed to maintain the separation between the RLA and the NLRA as "two independent and mutually exclusive federal labor schemes." *Id.* at 377.

This division between the RLA and the NLRA, neither crossing into the other's sphere, was confirmed in 1947 when the NLRA was amended to add, define, and prohibit the commission of unfair labor practices by unions. Responding to the criticism that it was "unfair" to allow "railway workers" to engage in conduct which was forbidden to "employees in others industries", Senator Taft stated that:[6]

> I want to point out that railway labor has never been covered by the Wagner Act; it has always been covered by the Railway Labor Act, which provides a somewhat different procedure. We saw no

---

[5] Hearings before the Subcommittee of the Senate Committee on Interstate Commerce on S. 2496, 74th Cong., 1st Sess. 6, 8-9, 25-27 (1935); S. Rep. No. 895, 74th Cong., 1st Sess. (1935); H. Rep. No. 2243, 74th Cong., 2d Sess. (1936).

[6] 93 Cong. Rec. 6498 (1947), in 2 Leg. Hist. LMRA 1571. "Leg. Hist. LMRA" refers to the two-volume edition of the Legislative History of the Labor Management Relations Act, 1947.

reason to change that situation, because there were no abuses which had arisen in connection with the operation of the Railway Labor Act.

"The exemption of employees of employers subject to Railway Labor Act is to make it perfectly clear that in providing remedies for unfair labor practices of unions and their agents it was not intended to include such employees."[7] And so, as this Court observed, "We think it clear that Congress, in excluding 'any person subject to the Railway Labor Act' from the statutory definition of 'employer,' carved out of the Labor Management Relations Act the railroads' employer-employee relationships which were, and are, governed by the Railway Labor Act." *Local Union No. 25, Teamsters* v. *N.Y., N.H. & Hart. R.R. Co.*, 350 U.S. 155, 160 (1956).

2. The dispute between Lufthansa and IAMAW concerning the form of subcontracting control to prevail in the performance of commissary work by and for Lufthansa is wholly within the domain of the RLA, and the solution upon which they agreed is entirely legal under the terms of the RLA. Nothing in the RLA prohibits an air or rail carrier, in compromise of a demand that all the work be performed solely by the carriers' employees, to agree that the work may be contracted out only to named firms, that the carrier and

---

[7] S. Rep. No. 105, 80th Cong., 1st Sess., 19 (1947), in 1 Leg. Hist. LMRA 425. Similarly, when Congress in 1947 enacted Title II of the Labor Management Relations Act, 1947, establishing a conciliation procedure and providing for an 80-day strike injunction in the case of a national emergency, it stipulated that "The provisions of this title shall not be applicable to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time" (§ 212).

the union shall attempt to agree upon a new firm if the carrier is required to change an existing firm or initially select another firm, and that the carrier is free to select any firm of its own choice if they fail to agree upon a "Union" firm within a designated period (*supra*, pp. 8-10).[8] Had Lufthansa and IAMAW failed to reach their compromise agreement, their dispute over subcontracting would have been submitted to the successive statutory steps prescribed by the RLA of mediation, proffer of voluntary arbitration, and emergency board fact-finding if necessary (*supra*, p. 3). Had the parties "unsuccessfully exhausted the Railway Labor Act's procedures", they would then be free "to employ the full range of whatever peaceful economic power they . . . [could] muster," including on the IAMAW's part resort to strike and "picketing—whether characterized as primary or secondary . . . ." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 392-393 (1969).

3. The NLRB would displace the statutory regime of the RLA by subjecting resolution of Lufthansa's and IAMAW's subcontracting dispute to the proscriptions of section 8(e) of the NLRA banning the so-called "hot cargo" agreement. But the wording of section 8(e) itself bars that intrusion. For it reaches only an agreement between "any labor organization and any employer." And by explicit definitional exclusion Lufthansa as an air carrier is *not* an "employer" within the purview of the NLRA to which the proscriptions of section 8(e) can apply. Given the conscious and deliberate use of the definitional exclusions to maintain the

[8] See, *Order of Railroad Telegraphers* v. *Chicago and Northwestern R. Co.*, 362 U.S. 330 (1960).

division between the RLA and the NLRA, the word "employer" in section 8(e) cannot be given an unrestricted generic reach in defiance of its statutory definition designedly adopted to preclude the application of the NLRA to RLA empoyers and employees.

Nor is the IAMAW a "labor organization" within the meaning of section 8(e) when it acts as the representative of RLA employees in seeking an agreement with their RLA employer. As this Court has held, "when the traditional railway labor organizations act on behalf of employees subject to the Railway Labor Art in a dispute with carriers subject to the Railway Labor Act, the organizations must be deemed, *pro tanto*, exempt from the National Labor Relations Act." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 376-377 (1969). The IAMAW is a traditional railway labor organization. "The International Association of Machinists was started in Atlanta, Georgia, by nineteen railroad machinists on May 5, 1888."[9] It remains to this day the shopcraft union representing the railroad machinists.[10] And it is the dominant union representing airline ground personnel.[11]

The NLRB would have it, however, that the IAMAW is not a traditional RLA union because it "is composed overwhelmingly of nonrailroad or nonairline employees ...." (*infra*, p. 20a). This is a complete *nonsequitur*. The IAMAW is a traditional RLA union within the field relevant to the operation of the Railway Labor

[9] M. Perlman, The Machinists: A New Study in American Trade Unionism, 3 (1962).

[10] 38 N.M.B. Ann. Rep. 101-102 (1973).

[11] *Id.* at 103.

Act and nontheless so because it represents large numbers of workers in other fields as well. Whether a union is within or without the purview of the NLRA or the RLA does not depend on the happenstance of its unrelated overall composition.

4. The NLRB seeks to justify an unrestricted reading of section 8(e) of the NLRA to reach agreements between an RLA employer and a union representing RLA employees in reliance upon the 1959 legislative history of sections 8(e) and 8(b)(4)(B). But an unobfuscated analysis of that history disproves the NLRB's thesis.

(a) Numbered 8(b)(4)(A) as enacted in 1947 and 8(b)(4)(B) as amended in 1959, Congress in these sections of the NLRA prohibited the so-called secondary boycott. As originally adopted in 1947, section 8(b)(4)(A) prohibited inducement of "the employees of any employer" to engage in secondary activity. It "had been held that the term 'the employees of any employer' limited the application of the statute to those within the statutory definitions of 'employees' and 'employer.'" *N.L.R.B.* v. *Servette*, 377 U.S. 46, 51 (1964). "In view of these definitions, it was permissible for a union to induce work stoppages by minor supervisors, and farm, railway or public employees." *Id.* at 51, n. 6. To close this loophole, Congress in 1959 substituted the phrase "any individual employed by any person" for "the employees of any employer." *Id.* at 52. This "change was designed to make the provision applicable to refusals by employees who were not technically 'employees' within the statutory definitions . . ." *Ibid.* The change was accomplished by altering the wording to use lan-

guage clearly free of the restrictions of the statutory definitions, and the sponsors explicitly explained that the change was meant to prohibit inducement of rail and other nonstatutory employees. *Id.* at 53, n. 8. The change thus simply prohibited enlistment of nonstatutory employees as well as statutory employees to carry on secondary activity. It enlarged the class of employees who were not to be subject to prohibited inducement. But it did not enlarge the class of unions to which the prohibition applied over that which had formerly obtained. RLA employers, unions, and employees were as free after the change as before from the prohibitory reach of the NLRA. *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

(b) Section 8(e) of the NLRA had a separate evolution. This Court had held that as originally enacted in 1947 section 8(b)(4)(A) did not invalidate entry into a hot cargo agreement or its voluntary observance but did prohibit its coercive enforcement. *Local 1976, Carpenters* v. *N.L.R.B.*, 357 U.S. 93 (1958). "Section 8(e) was designed to plug this gap in the legislation by making the 'hot cargo' clause itself unlawful." *National Woodword Manufacturers Assn.* v. *N.L.R.B.*, 386 U.S. 612, 634 (1967). Except for the building and construction industry and the apparel and clothing industry, section 8(e) prohibits "any labor organization and any employer" from entering into a hot cargo agreement and makes that agreement "unenforceable and void." The route to this result is easily traced.

The bill reported by the Senate Labor Committee did not contain any provision dealing with the hot cargo agreement. The minority on the Committee

criticized this omission.[12] On the Senate floor an amendment was thereafter adopted limited to invalidating hot cargo agreements with "a common carrier subject to Part II of the Interstate Commerce Act."[13] Extension of the invalidation to employers other than motor carriers was expressly rejected.[14]

In the House, the House Labor Committee reported a bill which also limited the invalidation of hot cargo agreements to those entered into with motor carriers.[15] The minority of the House Labor Committee criticized this limitation.[16] On the floor the House voted to invalidate hot cargo agreements entered into by "any labor organization and any employer."[17] In conference, the different reach of the two bills—the Senate bill limited to motor carriers and the House Bill extending to "any employer"— was compromised by adopting the broader coverage of "any labor organization and any employer," but by excepting from this class the building and construction industry and the clothing and apparel industry, and in that form section 8(e) was enacted.[18] The construction and

---

[12] S. Min. Rep. No. 187, 86th Cong., 1st Sess., 79-80 (1959), in 1 Leg. Hist. LMRDA 79-80. "Leg. Hist. LMRDA" refers to the two-volume edition of the Labor-Management Reporting and Disclosure Act of 1959.

[13] 105 Cong. Rec. 6556-58 (1959), in 2 Leg. Hist. LMRDA 1161-63.

[14] *Ibid.*

[15] H. Rep. No. 741, 86th Cong., 1st Sess., 58, 60 (1959), in 1 Leg. Hist. LMRDA 816, 818.

[16] *Id.* at 97, in 1 Leg. Hist. LMRDA 855.

[17] 105 Cong. Rec. 15891 (1959), in 2 Leg. Hist. LMRDA 1700-01.

[18] H. Rep. No. 1147, 86th Cong., 1st Sess., 26, 27, 39, in 1 Leg. Hist. LMRDA 943; 105 Cong. Rec. 17899, 17919-20, 18153-54 (1959), in 2 Leg. Hist. LMRDA 1432, 1452-53, 1738-39.

clothing industries were exempted because of their special problems.[19]

There is thus nothing in the legislative evolution of section 8(e) which gives the slightest support to the notion that the words "any labor organization and any employer" used by it were not meant to be cabined by the statutory definitions expressly adopted to demarcate the NLRB's orbit of authority. On the contrary, when Congress did mean to bar enlistment of railroad workers and other nonstatutory employees in carrying on secondary activity, it deliberately used words free of definitional confinement and explicitly adverted to its intention to bar inducement of railroad and other nonstatutory employees (*supra*, pp. 18-19). The contrast in the case of section 8(e), both in the use of statutorily-defined limiting words and in the absence of any advertence to an enlarged meaning, eloquently bespeaks that Congress intended the literal import of its language.

Nor can the NLRB persuasively invoke the statement of Congressman Landrum on the House floor that "if such contracts are bad in one segment of our economy, they are undesirable in all segments" (*infra*, p. 14a; 105 Cong. Rec. 14343 (1959), in 2 Leg. Hist. LMRDA 1518). His remark was directed to and criticized the limitation of the hot cargo ban to motor carriers. He supported enlargement of the ban from entry into an agreement with "a common carrier subject to Part II of the Interstate Commerce Act" to entry into an agreement with "any employer." Nothing in this expansion to "any employer" sug-

---

[19] *National Woodwork Manufacturers Assn.* v. *N.L.R.B.*, 386 U.S. 612, 637-639 (1967).

gests an unrestricted reach to those employers who are beyond the NLRA's statutory regime as specified by the Act's definition of that word.

Indeed, Congressman Landrum's statement is manifestly inapposite to the scope of section 8(e) as it ultimately evolved. He spoke on July 27, 1959, well before the conference agreement on September 3, 1959, which modified "any employer" to exempt the construction and clothing industries (*supra*, pp. 20-21). Given these significant exceptions, it is not even true that section 8(e) blankets those employers who are admittedly within the NLRA's statutory regime, and the universality imputed to Congressman Landrum's statement thus breaks under the weight of section 8(e) itself.

Furthermore, the exception of the construction and clothing industries because of their special problems especially dictates the conclusion that section 8(e) cannot be extended to air and rail transportation by freewheeling interpretation. This Court has already explained the exact reasons for this conclusion (*Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 392 (1969)):

> Moreover, "[f]rom the point of view of industrial relations our railroads are largely a thing apart . . . .'The railroad world is like a state within a state.'" . . . Thus, if Congress should now find that abuses in the nature of secondary activities have arisen in the railroad industry, . . . it might well decide—*as it did when it considered the garment and construction industries, see NLRA §8(e)*—that this field requires extraordinary treatment of some sort . . . Certainly, it is for the Congress, and not the courts, to strike the balance "between the uncontrolled power of management

and labor to further their respective interests." . . . The Congress has not yet done so. [Emphasis supplied.]

(c) The last bit of history on which the NLRB relies is easily dispatched. The NLRB points out that the bill as passed by the House prohibited a union from exerting economic pressure where an object was "forcing or requiring *any person* . . . to cease, *or agree to cease,* doing business with any other person . . . ." (*infra,* pp. 16a-17a; 105 Cong. Rec. 15891 (1959), in 2 Leg. Hist. LMRDA 1700; emphasis supplied). First of all, this provision does not even invalidate the hot cargo agreement, but simply bars use of economic pressure to secure one. Furthermore, this provision did not survive the conference, it being replaced by section 8(b)(4)(A) which bars a union from exerting economic pressure where an object is "forcing or requiring *any employer* . . . to enter into any agreement which is prohibited by section 8(e)." (Emphasis supplied.) Thus, section 8(b)(4)(A) was brought into precise alignment with section 8(e). As in the case of the agreement, so in the case of economic pressure to obtain it, "any employer," not "any person," is the subject of statutory protection, and economic pressure against "an employer" to assent to an agreement is barred only when the agreement is one "prohibited by section 8(e)."[20]

4. The NLRB's uncritical foray is emphasized by the observation in dissent of Member John H. Fanning who noted that the NLRB's interpretation would reach

---

[20] *Conliffe Village Apartments,* 148 NLRB 854 (1964), remanded on another ground *sub nom. Northeastern Indiana Bldg. & Const. Trades Council* v. *N.L.R.B.,* 352 F.2d 696 (C.A.D.C., 1965).

agreements in alleged violation of section 8(e) entered into "by railroads, airlines, the Federal and state Governments and their political subdivisions, the Federal Reserve Bank, wholly owned Government corporations, and nonprofit hospitals, all of which are excluded from the definition of 'employer' contained in Section 2(2) of the Act" (*infra*, pp. 23a-24a). Air and rail transportation, public employment, and nonprofit hospital operation all have distinctive labor problems handled by distinctive systems of law foreign to the NLRA. The form that subcontracting control should lawfully take in these disparate fields is dependent on the demands, traditions, and operational characteristics unique to each. It may be, as section 8(e) requires in the case of NLRA employers other than those in the construction and clothing industries, that subcontracting control over firms to whom work is let should be limited to a requirement that the work shall be performed only by firms who operate under labor standards commensurate with those that prevail at the establishment that is contracting out the work.[21] Or it may be, as in the case of the construction and clothing industries excepted from section 8(e), that firms to which work may be subcontracted should be limited to those who are under union contract with the same local as represents the employees of the establishment contracting out the work, or another local of the same international union, or with an AFL-CIO affiliate. Or some other form of subcontracting control may be more appropriate. But whatever the choice may be, it is a legislative decision that is required, and Congress has not yet made it for any non-

---

[21] *Meat and Highway Drivers, Local Union No. 710* v. *N.L.R.B.*, 335 F.2d 709, 715-717 (C.A.D.C., 1964).

NLRA employers, as this Court has held (*supra*, pp. 22-23).

CONCLUSION

A pure and important question of statutory interpretation concerning the jurisdictional reach of the RLA and the NLRA has been decided in a way that brings the two statutes into collision. Instead of maintaining the RLA and the NLRA as "two independent and mutually exclusive federal schemes" (*Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969)), with neither treading on the ground of the other (*Local Union No. 25, Teamsters* v. *N.Y., N.H. & Hart. R.R. Co.*, 350 U.S. U.S. 155, 159-160 (1956)), the NLRB applying its statute has invalidated an agreement legal under the terms of the RLA entered into between an RLA employer and a union representing its RLA employees. The petition should be granted.

Respectfully submitted,

PLATO E. PAPPS
LOUIS P. POULTON
1300 Connecticut Avenue, N.W.
Washington, D.C. 20036

BERNARD DUNAU
912 Dupont Circle Building, N.W.
Washington, D.C. 20036

ALFRED M. KLEIN
ROBERT M. SIMPSON
727 West 7th Street
Los Angeles, California 90017

Attorneys for Petitioner

May 1974

I

197 NLRB No. 18

D—5931
Los Angeles, Calif.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 31—CE—28

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO

and

LUFTHANSA GERMAN AIRLINES

and

MARRIOTT IN-FLITE SERVICES, DIVISION OF MARRIOTT CORPORATION

Decision and Order

Upon a charge duly filed by Marriott In-Flite Services, Division of Marriott Corporation, hereinafter Marriott, on March 19, 1971, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 31, issued a complaint on May 14, 1971, against International Association of Machinists & Aerospace Workers, AFL-CIO, hereinafter IAM or the Union, and Lufthansa German Airlines, hereinafter Lufthansa or the Company, alleging that Respondents IAM and Lufthansa had engaged in, and were engaging in, unfair labor practices within the meaning of Section 8(e) of the National Labor Relations Act, as amended, by entering into, and giving effect to, an agreement whereby Lufthansa agreed to cease doing business with Marriott. IAM and Lufthansa filed answers on May 27, 1971, and June 7, 1971, respectively, denying the commission of any unfair labor practices.

On June 30, 1971, the parties executed a stipulation by which they waived a hearing before a Trial Examiner and the issuance of a Trial Examiner's Decision and recommended Order and agreed to submit the case to the Board for findings of fact, conclusions of law, and an order based upon a record consisting of the charge, the complaint and notice of hearing, the answers, and the stipulation of facts and exhibits attached thereto.

On July 14, 1971, the Board approved the stipulation of the parties and ordered the proceeding transferred to the Board, granting permission and time for the filing of briefs. Thereafter, the General Counsel, Marriott, IAM, and Lufthansa each filed a brief.[1]

Upon the basis of the stipulation, the briefs, and the entire record in this case, the Board makes the following:

FINDINGS OF FACT

I. The Business of the Employer

Marriott, a Delaware corporation, is engaged in the business of providing in-flight food services for various airlines at airports in several cities and States of the United States, including Los Angeles, California. During the 12-month period preceding the filing of the charge herein, Marriott, in the course and conduct of its business operations, purchased and received at its Los Angeles in-flight kitchen goods valued in excess of $50,000 directly from points outside the State of California and shipped from Los Angeles goods valued in excess of $50,000 directly to points located outside the State of California. We find that Marriott is engaged in commerce within the meaning of the Act and that it will effectuate the puoposes of the Act to assert jurisdiction herein.[2]

---

[1] The parties' request for oral argument is hereby denied as the record adequately presents the issues and positions of the parties.

[2] *Siemons Mailing Service*, 122 NLRB 81.

II. The Labor Organization Involved

IAM is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning terms and conditions of employment. Approximately 88 percent of IAM's membership are employees within the meaning of Section 2(3) of the Act; the remainder of its membership are employees who are covered by the Railway Labor Act. More than 96 percent of the Union's collective-bargaining agreements are with employers within the meaning of Section 2(2) of the Act; the balance are with employers who are subject to the Railway Labor Act. We find that IAM is a labor organization within the meaning of Section 2(5) of the Act.[3]

III. The Unfair Labor Practices

A. *Facts*

Lufthansa, a corporation existing under the laws of the Federal Republic of Germany, provides air transportation of passengers and goods to and from points within the United States and other countries. It is a "carrier by air" within the meaning of section 201 of the Railway Labor Act (45 U.S.C. § 151, et seq.) and, therefore, is not an employer within the meaning of Section 2(2) of the Act.[4]

In connection with its flight operations, Lufthansa maintains a catering facility at John F. Kennedy (JFK) Airport in New York City that prepares some of the food for the Company's flights from JFK. In 1961 Lufthansa recognized the Union as the exclusive collective-bargaining representative of Lufthansa's catering employees in a craft or class certified by the National Mediation Board under the

---

[3] Cf. *International Brotherhood of Electrical Workers (B. B. McCormick and Sons, Inc.)*, 150 NLRB 363, 371, enfd. *per curiam* 350 F.2d 791 (C.A.D.C.), cert. denied 383 U.S. 943.

[4] Section 2(2) of the Act excludes from the definition of "employer" "any person subject to the Railway Labor Act."

Railway Labor Act. This "unit" encompasses all such employees working for the Company in the United States, its possessions, its territories, and Puerto Rico.

However, because the Company historically employed catering department personnel only at JFK, and it contracted out catering services at the other airports from which it operates, the successive collective-bargaining agreements executed by the parties from 1961 to 1971 have contained memoranda of understanding whereby IAM waived its jurisdiction over the non-JFK work and permitted Lufthansa to contract out for such services in the following instances:

(a) Work historically performed prior to the date of the signing of the Agreement;

(b) Where catering facilities are not provided;

(c) Where the work load is such that the facilities and/or personnel are not sufficient to accomplish the work, provided that no lay-off results.

Pursuant to the above memoranda the airline continued the contractual relationship with Marriott it had begun in 1956 for the catering of all Lufthansa flights from Chicago's O'Hare Airport. In January 1969, the Company contracted with Continental Airlines for the preparation of food for all Lufthansa flights from Los Angeles International Airport. Other contractors were utilized during this period at Boston (Marriott), Anchorage (Northwest Orient Airlines), and Philadelphia (Ogden Foods). All of the above save Marriott are unionized.

The Company became dissatisfied with Continental's service in Los Angeles and terminated its contract with that airline as of December 1, 1969, when Marriott began providing food for Lufthansa's Los Angeles flights. Four employees represented by the Union were discharged when Continental's contract with Lufthansa was terminated. At or about the same time, Marriott and the Company dis-

cussed the possibility of Marriott's providing catering service for the airline's Boeing 747 jet flights from JFK.

In late 1969 IAM and Lufthansa commenced negotiating a collective-bargaining agreement to replace the contract covering catering employees then due to expire in mid-1970. During the discussions, union representatives pressed the Company to sever its relationship with nonunion caterer Marriott. Lufthansa's catering manager for North and Central America informed Marriott officials soon after Marriott had assumed the Los Angeles work that IAM had given the Company a time limit in which to find a union caterer in Los Angeles. The Union also unequivocally refused to permit contracting by the Company with Marriott at JFK.

Eventually, on February 12, 1971, the Company and the Union executed a renewal collective-bargaining agreement effective retroactively from June 1, 1970, to May 31, 1973. The contract contains, *inter alia*, the following memorandum of understanding which the General Counsel alleges violates Section 8(e) of the Act:

> IT IS HEREBY MUTUALLY AGREED THAT THE Union grants a waiver of Article II (a) and (b) of the Agreement [Scope of Agreement] between the Company and the International Association of Machinists and Aerospace Workers to the following extent:
>
> * * * * * * * * *
>
> A. The Company and the Union agree as follows concerning the performance of catering work at John F. Kennedy Airport, since the workload is such that the facilities at JFK are not sufficient to accomplish the work:
>
> 1. The Company will continue to prepare meals and food in its own flight kitchen to the extent the facilities permit.
>
> * * * * * * * * *

5. The Company shall engage Chefs Orchid for the performance of that catering service which, in conformity with paragraph 1 and 2, above, it is unable to perform in its own flight kitchen. . . .

* * * * * * * * * *

B. The Company and the Union agree where catering facilities are not provided, the Company may continue to farm out the work and shall engage the following caterers to perform its catering service at the following location:

LOCATION	CATERER
Los Angeles	Chefs Orchid
Anchorage	Northwest Airlines
Boston	Marriott
Philadelphia	Ogden Foods (Berlo)
Chicago	Chefs Orchid

In the event that the Company undertakes to perform the catering service for scheduled flights at any other location, the Company shall give the Union (60) days written notice of its intention to do so, and during that sixty (60) day period the Company and the Union shall attempt to agree upon the caterer to perform the catering service at the new location. In the event that the Company and the Union do not agree upon a Union caterer within that period, for reasons of quality, service or price, the company may then select a caterer of its choice.

C. In the event that the Company determines that a caterer named in, or hereafter selected in accordance with, paragraphs A or B above fails to meet the Company's requirements as to quality, service or price, the Company shall give the Union sixty (60) days written notice of its desire to change to another caterer, and during that sixty (60) day period the Company and the Union shall attempt to agree upon a new caterer. In

> the event that the Company and the Union do not agree upon a Union caterer within that period, the Company may then select a caterer of its choice.

In early March 1971, Lufthansa informed Marriott that pursuant to the above memorandum the airline would have to terminate its contracts with Marriott at Los Angeles and Chicago.[5] Lufthansa ended its Los Angeles Marriott service on May 15, 1971, and had planned to cancel the Chicago contract on June 1. At the same time, the airline engaged Chef's Orchid[6] to replace Marriott at Los Angeles and Chicago, and to supplement its operations at JFK. However, on May 26, 1971, the Regional Director for Region 31 secured a temporary injunction in the United States District Court for the Central District of California, under Section 10(1) of the Act, which injunction, as amended on May 28, had the effect of preventing the cancellation of the Lufthansa-Marriott contract at Chicago and reinstating the parties' relationship in Los Angeles.

B. *The Issue Involved and Contentions of the Parties*

Section 8(e), which was added to the Act in 1959, in relevant part provides:

> It shall be an unfair labor practice for *any labor organization* and *any employer* to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any *other employer*, or to cease doing business with any other *person*, and any contract or agreement entered into here-

---

[5] Marriott has catered Lufthansa's Boston flights for several years but the value of the food and service provided there was only $1,000 per year. This relationship was unaffected by the allegedly unlawful agreement.

[6] Chef's Orchid is a union caterer whose employees are not represented by IAM.

tofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . . [Emphasis supplied.]

Marriott and the General Counsel contend that the instant agreement violates Section 8(e) even though Lufthansa is not an "employer" within the meaning of the Act because Congress intended Section 8(e) to outlaw hot cargo agreements executed by labor organizations and employers in the generic sense of the words. They also contend that, because Section 8(e) and Section 8(b)(4)(B) are complementary secondary boycott provisions of the Act, the term "any employer" of Section 8(e) should be construed as synonymous with "any person," as that phrase is used in Section 8(b)(4)(B).[7]

IAM and Lufthansa, whose arguments will be considered together, contend that Section 8(e) only outlaws hot cargo agreements which are executed by "employers" and "labor organizations" within the meaning of Section 2(2) and (5) of the Act, respectively. They argue, too, that the Board lacks jurisdiction over the labor relations of employers and employees who are subject to the Railway Labor Act. In particular, Lufthansa and IAM assert that, in amending the Act in 1959 to close certain loopholes in the secondary boycott provisions, Congress extended the Act's protection against secondary conduct to airlines but did not make various unfair labor practice prohibitions applicable to airlines or their employees.

C. *Discussion and Conclusion*

Assuming, *arguendo*, that the Board is empowered under Section 8(e) to determine the lawfulness of the instant agreement, it is clear that the memorandum of understanding executed by the parties on February 12, 1971, would constitute an unlawful hot cargo contract. The challenged

---

[7] Section 2(1) of the Act defines "person" as including one or more corporations.

agreement in effect requires Lufthansa to cease doing business with Marriott and contract only with union caterers.[8] It is apparent from the record that the Union was primarily concerned with Marriott's status as a nonunion caterer and not with preserving work for unit employees especially since Lufthansa had never employed union members in the catering department except at JFK, where no catering jobs were being threatened.

As the Supreme Court stated in *National Woodwork Manufacturers Association* v. *N.L.R.B.*,[9] "The touchstone [of a hot cargo agreement] is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees . . ."[10] or is "tactically calculated to satisfy union objectives elsewhere."[11] In the latter case the boycotting employer is a neutral bystander, and the agreement or boycott is secondary.[12]

The crux, therefore, of the instant case is whether Congress intended to outlaw hot cargo agreements only when they were executed by statutory labor organizations and employers. Despite the seemingly clear language of Section 8(e), resort to the legislative history of the Act is warranted for, as the Supreme Court recently noted,

> . . . labor legislation is peculiarly the product of legislative compromise of strongly held views . . . . [L]egislative history may not be disregarded merely because it is arguable that a provision may unambiguously em-

---

[8] The record does not reveal the reason for IAM's not requiring the Company to cease doing business with Marriott in Boston and retain there a union caterer but we note that the value of the service rendered in Boston was less than $1,000 per year.

[9] 386 U.S. 612.

[10] *Id.* at 645.

[11] *Id.* at 644.

[12] *Id.* at 644-645.

> brace conduct called in question. . . . [T]he section must be construed in light of the fact that it "is only one of many interwoven sections in a complex Act, mindful of the manifest purpose of the Congress to fashion a coherent national labor policy."[13]

As enacted in 1947, Section 8(b)(4)(A) of the Act (now Section 8(b)(4)(B)) made it an unfair labor practice for a labor organization, *inter alia*, to induce or encourage the "employees of any employer" to engage in a strike or certain other concerted activities where an object of such conduct was forcing or requiring any employer or other person to cease doing business with any other person. In 1959 Congress sought "to close certain loopholes in the application of § 8(b)(4)(A) which had been exposed in Board and court decisions."[14]

Thus, in *International Rice Milling*,[15] the Board held that the phrase "employees of any employer" meant that Congress intended in Section 8(b)(4)(A) only to prohibit union inducement or encouragement of employees of statutory employers. There, the Board found that it was not unlawful for a Teamsters local to induce railroad employees to cease handling the goods of certain rice mills which the Teamsters had struck.[16] The Fifth Circuit Court of Appeals disagreed with the Board's interpretation of Section 8(b)(4)(A), holding that the words "any employer" embraced the "class of employers as a whole, and not merely those

---

[13] *N.L.R.B.* v. *Allis-Chalmers Manufacturing Company*, 388 U.S. 175, 179-180.

[14] *N.L.R.B.* v. *Servette, Inc.*, 377 U.S. 46, 51.

[15] 84 NLRB 360.

[16] In *Local 25, Teamsters* v. *N.Y., N.H. & H. RR. Co.*, 350 U.S. 155, the Court under similar circumstances held that a railroad could file a charge under Sec. 8(b)(4)(A); "since railroads are not excluded from the Act's definition of 'person,' they are entitled to Board protection from the kind of unfair labor practices proscribed by § 8(b)(4)(A)." *Id.* at 160.

within the [statutory] definition of 'employer.'"[17] In affirming the Board's order, the Supreme Court did not pass upon the conflict between the Board and the Fifth Circuit on the issue.[18] Consequently, under the Board's holding unions could enlist the aid of nonstatutory agricultural, governmental, railroad, or airline employees to carry out secondary boycotts without violating Section 8(b)(4)(A). And, by its terms, Section 8(b)(4)(A) did not proscribe such union conduct directed against employers of such employees. In *Local 1976, Carpenters* [*Sand Door*] v. *N.L.R.B.*,[19] the Supreme Court held that a hot cargo clause in a collective-bargaining agreement was not *per se* unlawful, although it was not a defense to secondary boycott activity.

As the Court noted in *Servette, supra,* in 1959 Congress was cognizant that the above decisions and other Board and court pronouncements had created large loopholes in Section 8(b)(4)(A).[20] The Senate bill introduced by Senator John Kennedy (S. 1555) contained no proposed changes in Section 8(b)(4)(A), however. The so-called administration bill sponsored by Senators Goldwater and Dirksen (S. 748), which was adopted by the House in relevant part as H.R. 8400, but was rejected in the Senate after being introduced from the floor by Senator Dirksen, would have amended the Act's secondary boycott provisions significantly.

As discussed by Senators Dirksen and Goldwater in their minority report on S. 1555, S. 748 would have overruled the Board's decision in *International Rice Milling, supra,* by

---

[17] *International Rice Milling Co., Inc.* v. *N.L.R.B.*, 183 F.2d 21, 25 (C.A. 5).

[18] *International Rice Milling Co., Inc.* v. *N.L.R.B.*, 341 U.S. 665, 668, fn. 2.

[19] 357 U.S. 93.

[20] See, e.g., 1 Leg. Hist. 476 (LMRDA, 1959) (S. Rept. No. 187 on S. 1555; minority views).

making Section 8(b)(4)(A)'s restrictions applicable not solely to conduct directed at employees of statutory employers but also to union conduct designed to "threaten, coerce, or restrain any person engaged in commerce" and to "induce or encourage any individual employed by any person." They stated:

> Under the definition section of the Taft-Hartley Act railroad employees, agricultural workers, and governmental employees are not employees within the meaning of the act. The Board has reached the conclusion that secondary boycotts by these exempt categories, and the inducement of such boycotts are not unfair labor practices . . . .
>
> Secondary boycotts by these groups are just as much against the public interest as boycotts by anyone else.[21]

After S. 748 was introduced on the Senate floor, Senator Goldwater commented that the bill would

> . . . extend the protection of the secondary boycott provisions of the act to . . . railroads . . . without subjected them to *other* provisions of the act.[22] [Emphasis supplied.]

By proposing to make it unlawful under Section 8(b)(4)(A) for a union to engage in proscribed conduct to force or require

> . . . *any person* . . . *to agree* to cease, using, selling, handling, transporting, or otherwise dealing in the products of any other producer . . . or *to agree* to cease doing business with any other person . . . [Emphasis supplied.]

S. 748 would have modified the Board's *International Rice Milling* decision, *supra*, by banning certain union conduct directed against "any person" (for example, an airline or

---

[21] I Leg. Hist. 476.

[22] II Leg. Hist. 1079.

railroad) where the object was securing that persons's assent to, or compliance with, a hot cargo clause. However, S. 748 would not have altered the dictum in *Sand Door* that hot cargo agreements are not unlawful *per se*.

Senator Gore introduced a limited ban on hot cargo clauses which, as amended by Senators McClellan and Smathers, was passed by the Senate in the following form:

> It shall be an unfair labor practice for any labor organization and any employer who is a common carrier subject to Part II of the Interstate Commerce Act [23] to enter any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, or transporting any of the products of any other employer or to cease doing business with same.

Senator Gore indicated that he introduced the above amendment because "it would be contrary to the public interest for . . . a common carrier to enter into a contract to refuse to deliver goods to certain employers" inasmuch as the Government had given the carrier a franchise to serve the public on a particlar route.[24]

In the House, the bill introduced by Congressman Elliot and reported by the Committee on Education and Labor (H.R. 8342) proposed no relevant, substantive amendments to Section 8(b)(4) but it proposed to adopt *in toto* Senator Gore's amendment to S. 1555. The House minority report termed this "a minor step in the right direction. . . . By

---

[23] The provisions of part II of the Interstate Commerce Act (49 U.S.C. § 301, *et seq.*) apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce. 49 U.S.C. § 302 (a).

[24] II Leg. Hist. 1161. Railroads and airlines enjoy similar franchises from the Government.

omission the committee bill would seem to put a stamp of *approval upon all other 'hot cargo' arrangements.*"[25] The House minority report also highlighted some of the loopholes in the secondary boycott provisions discussed above which the House committee bill did not close.

H.R. 8400, Congressman Landrum's substitute bill for H.R. 8342, proposed to amend then Section 8(b)(4)(A) and add Section 8(e) to read substantially as they appear in the Act today. As S. 748, H.R. 8400 would have made it unlawful for a union via proscribed means to force or require any person "to agree to cease, using, selling . . . or agree to cease, doing business with any other person. . . ." In explaining this amendment to Section 8(b)(4)(A), Representative Landrum stated:

> The committee bill would deal with this problem only in the very narrow way of proscribing the formal execution of "hot cargo" contracts with those employers subject to the Interstate Commerce Act, part II. There of course are thousands of employers not covered by such provisions, with whom the Teamsters, and other unions, could and surely would, execute and effectuate such agreements. By not prohibiting the others, by not naming them, the committee bill would indirectly sanction, if indeed not approve, their execution. *I submit if such contracts are bad in one segment of our economy, they are undesirable in all segments.*[26] [Emphasis supplied.]

In a similar vein, then Congressman Griffin, after noting that, in light of the proposed substitution of the term "any person" for "any employer" in Section 8(b)(4), railroad employees would be covered by the Act's secondary boy-

---

[25] I Leg. Hist. 855.

[26] II Leg. Hist. 1518.

cott provisions, commented on H.R. 8400's proposed Section 8(e):

> . . . the committee bill only nips at the heel of the problem by outlawing those hot cargo agreements which are made with common motor carriers. . . . Our substitute would ban all hot cargo agreements.[27]

After the substitute bill (H.R. 8400), containing current Section 8(e) and Section 8(b)(4)(B)'s proposed ban on hot cargo agreements obtained by unions from "persons" as a result of prohibited union conduct, was passed by the House, Senator John Kennedy and Congressman Thompson issued a comparison of the Senate and House bills which in relevant part noted:

> The House bill extends the prohibition to secondary boycotts by . . . employees of railroads and airlines. Apparently the theory is that the omission was simply a mistake in the original draftsmanship.
>
> The unions argue that since these groups receive none of the benefits of the NLRA they should be subjected to none of the burdens. The railway labor organizations particularly dislike the prospect of involvement with the NLRB. These arguments have some appeal but they do not carry much weight since *the employees who would be forbidden to engage in secondary boycotts have little to gain or lose from such activity.*[28] [Emphasis supplied.]

The conference committee considered the Senate's approach to the problem of hot cargo agreements (Senator Gore's limited ban on such agreements) and the House bill's

---

[27] II Leg. Hist. 1568. Representative Griffin also stated that "there is no valid reason why this prohibition [in the Gore amendment] on hot cargo contracts should apply only to the carriers subject to the Interstate Commerce Act." II Leg. Hist. 1523.

[28] II Leg. Hist. 1706-07.

two-pronged attack thereon (current Section 8(e)'s ban on all such clauses executed by "any labor organization and any employer" and the proposal in Section 8(b)(4)(B) to make it an unfair labor practice for a union via proscribed means to force or require "any person" to execute a hot cargo agreement) and reported a bill that was enacted by Congress without further amendment to the relevant sections. The conference bill, however, deleted Section 8(b)(4)(B)'s proposal to make it unlawful for a labor organization via proscribed means to force or require

> . . . any person . . . to agree to cease, using, selling, handling, transporting, or otherwise dealing in the products of any other producer . . . or to agree to cease doing business with any other person. . . .

The accompanying conference committee report stated:

> The conference committee adopted the provisions of the House amendment with the following changes: (1) the phrase "or agree to cease" was deleted from section 8(b)(4)(B) because the committee of conference concluded that the restrictions imposed by such language were *included in the other provisions dealing with prohibitions against entering into "hot cargo" agreements*, and therefore their retention in section 8(b)(4)(B) wou'd *constitute a duplication of language*. . . .
>
> The House amendment amends section 8 of the National Labor Relations Act, as amended, by adding at the end thereof a new subsection (e). . . .[29] [Emphasis supplied.]

It is apparent from the above discussion of the legislative history of Section 8(e) and Section 8(b)(4)(B) that Congress in 1959 intended to make it an unfair labor practice

[29] I Leg. Hist. 942-943.

for a labor organization, regardless of the conduct engaged in by the union, *to agree* with "any person" *that the latter* would cease doing business with any other person. Thus, despite its use of the phrase "any employer" in Section 8(e), it is clear from the above that Congress intended to enact in Section 8(e) a ban on hot cargo agreements at least as encompassing as the ban envisaged by the drafters of Section 8(b)(4)(B) which would have applied to hot cargo clauses executed by "any person." Otherwise, the conferees could not have determined that the language of Section 8(e) was a duplication of the terminology contained in the proposed hot cargo amendment to Section 8(b)(4)(B) which they deleted from the bill.

This interpretation of Section 8(e) is supported by a recent Supreme Court decision involving that section of the Act. In *National Woodwork Manufacturers Association* v. *N.L.R.B.*, *supra*, the Court, in holding that a work preservation agreement did not violate Section 8(e), noted in passing that "the language of § 8(e) is sweeping, [but] it closely tracks that of § 8(b)(4)(A) [now 8(b)(4)(B).]"[30] And, the "substitute Landrum-Griffin bill . . . expanded the [Senate] proposal to cover all industry and not common carriers alone."[31]

In his dissent in the same case, Justice Stewart, citing the Board's decision in *Ohio Valley Carpenters District Council (Cardinal Industries)*,[32] wrote:

> As the Court observes, the sweep of § 8(e) is no greater than that of § 8(b)(4). By the same logic, it is no narrower.[33]

---

[30] 386 U.S. at 635.

[31] *Id.* at 637.

[32] 136 NLRB 977.

[33] 386 U.S. at 660.

In *Ohio Valley*, the Board stated:

> . . . the validity of a restrictive agreement challenged under 8(e) must be considered in terms of whether that agreement, if enforced by prohibited means, would result in an unfair labor practice under Section 8(b)(4)(B). Clearly, there is little point and no logic in declaring an agreement lawful under 8(e), but in finding its enforcement condemned under 8(b)(4)(B). . . .[34]

In this latter regard, Lufthansa and IAM, citing *Railroad Trainmen* v. *Terminal Co.*[35] for the proposition that in 1959 Congress did not expand the class of employees or labor organizations whom the Act forbade to engage in secondary activities, contend that Section 8(e), and implicitly Section 8(b)(4)(B), do not prohibit the execution or enforcement of the instant agreement. They concede, however, that in 1959 Congress extended the protection of the secondary boycott provisions to railroads and airlines. However, it is clear beyond peradventure, and Respondents do not argue contra, that had IAM induced Lufthansa's employees to strike or engage in other concerted activity to force the Company to cease doing business with Marriott, the Union would have violated Section 8(b)(4)(B).[36] And, as the Board, with Court approval reasoned in *Ohio Valley*, it would be illogical to find unlawful a strike by IAM to force Lufthansa to cease doing business with Marriott under Section 8(b)(4)(B), while holding that a contract executed by IAM and Lufthansa designed to achieve the identical

---

[34] 136 NLRB at 987.

[35] 394 U.S. 369.

[36] See, e.g., *IBEW* (*B. B. McCormick and Sons, Inc.*), *supra*, fn. 3.

result was not proscribed by Section 8(e).[37] Nor do we believe that Congress, in closing a multitude of secondary boycott provision loopholes in 1959, intended that the Board create another loophole by reaching the result Respondents seek. Finally, as the above discussion of the legislative history of Section 8(e) and Section 8(b)(4)(B) clearly indicates, in 1959 Congress did intend to prohibit

---

[37] Our conclusion that the term "employer" contained in Section 8(e) was not intended by Congress to refer to a statutory employer is further buttressed by the language of Section 8(b)(4)(A) of the 1959 amendments, which prescribes certain conduct for an object of "forcing or requiring *any employer* or *self-employed person* to join any labor or employer organization or *to enter into any agreement which is prohibited by Section 8(e).*" (Emphasis supplied.) We do not believe that Congress intended to outlaw certain conduct which has as an object an agreement prohibited by Section 8(e) between a self-employed *person* and a labor organization but at the same time legislated to place out of reach of the statute such an agreement if voluntarily executed. Also in this connection we find noteworthy the commingled use of the phrase "any person" with the term "employer" in the apparel and clothing industry proviso to Section 8(e). Such mixed and interchangeable use of the terms "employer" and "person" further convinces us that Congress did not intend to restrict in Section 8(e) the meaning of the word "employer" to that defined in Section 2(2) of the Act, but, rather, used it in the generic or the dictionary sense. Further support for such conclusion is contained in the extension of remarks of Senator Goldwater on the 1959 amendments, II Leg. Hist. 1829, as follows:

> Employers are protected against secondary boycotts even though one of the two employers involved is a railroad employer, or an agricultural employer—they're also exempt—or a governmental body—municipality, or a non-profit hospital. These are all employers who are not included in the definition of employer under Taft-Hartley and that, therefore, you didn't have a violation of secondary boycott if they were one of the parties involved. *Now the term "employer" is actually employer in its dictionary sense.* So that's the second loophole that's covered. [Emphasis supplied.]

airline employee unions from engaging in the instant conduct.[38]

Railroad Trainmen, supra, is inapposite to the circumstances of the instant case. There, labor organizations composed predominantly and overwhelmingly of employees subject to the Railway Labor Act picketed a terminal owned by several railroads in furtherance of a dispute over terms and conditions of employment for railroad employees they had with the Florida East Coast Railway. The Court held that that was a "railway labor dispute, pure and simple"[39] and that "there is absolutely no warrant for incorporating into [the Railway Labor Act] the panoply of detailed law developed by the National Labor Relations Board and the courts under § 8(b)(4)."[40] Here, the labor organization involved, IAM, is composed overwhelmingly of nonrailroad or nonairline employees, the dispute is not over the terms and conditions of employment of airline employees,[41] but

---

[38] See also the extension of remarks of Senator Dirksen on the 1959 amendments in which he stated: "The bill also brings under picketing and secondary boycott prohibitions of the bill and the Taft-Hartley Act several groups of workers not previously covered, including railroad, airline, farm, and local government workers." II Leg. Hist. 1823.

[39] 394 U.S. at 377.

[40] *Id.* at 391.

[41] In *Local 25, Teamsters, supra,* fn. 16, the Court stated at 160:

> We think it clear that Congress, in excluding "any person subject to the Railway Labor Act" from the statutory definition of "employer," carved out of the Labor Management Relations Act the railroads' employer-employee relationships which were, and are, governed by the Railway Labor Act.

In finding unlawful the hot cargo agreement in the collective-bargaining agreement between IAM and Lufthansa, we are not interfering with the "employer-employee relationships" of employees and employers subject to the Railway Labor Act. The hot cargo provision has no impact on the terms and conditions of employment of Lufthansa's employees. Rather, it looks to the employment relationships of the nonairline employees of Marriott. Accordngly, the above quotation from *Local 25, Teamsters* we deem inapplicable to the present case.

of employees of an employer, Marriott, which is not subject to the Railway Labor Act, and the dispute involves one particlar section of the National Labor Relations Act which, in our opinion, Congress intended to be applicable to the present situation.

In sum, we find that the Board is empowered under Section 8(e) of the Act to determine the lawfulness of the instant agreement executed by IAM, a statutory labor organization, and Lufthansa, an airline within Section 2(1)'s definition of "any person."

Accordingly, for the reasons above, we find that by entering into and giving effect to the memorandum of understanding contained in the collective-bargaining agreement executed by the Company and the Union on February 12, 1971, IAM and Lufthansa violated Section 8(e) of the Act.

IV. The Remedy

Having found that Respondents IAM and Lufthansa have engaged in certain unfair labor practices, we shall order that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Marriott In-Flite Services, Division of Marriott Corporation, is a person engaged in commerce within the meaning of Section 2(1), (6), and (7) of the Act; Lufthansa German Airlines is a person within the meaning of Section 2(1) and is an employer of employees who are represented by a statutory labor organization.

2. International Association of Machinists & Aerospace Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By entering into and giving effect to an agreement whereby Respondent Lufthansa German Airlines agreed to cease doing business with Marriott In-Flite Services, Respondent International Association of Machinists and Aero-

space Workers, AFL-CIO, and Respondent Lufthansa German Airlines violated Section 8(e) of the Act.

4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, International Association of Machinsts & Aerospace Workers, AFL-CIO, its officers, agents, and representatives, and Lufthansa German Airlines, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining in effect, giving effect to, or enforcing a memorandum of understanding contained in a collective-bargaining agreement entered into by and between Respondent International Association of Machinists & Aerospace workers, AFL-CIO, and Respondent Lufthansa German Airlines on or about February 12, 1971, whereby Respondent Lufthansa German Airlines ceased or refrained or agreed to cease or refrain from doing business with Marriott In-Flite Services, Division of Marriott Corporation.

(b) Entering into, enforcing, or giving effect to any other contract or agreement, express or implied, wherby Respondent Lufthansa German Airlines ceases or refrains or agrees to cease or refrain from doing business with Marriott In-Flite Services, Division of Marriott Corporation.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Post at the business offices and meeting halls of the aforesaid Union, and at the catering department facilities of the aforesaid Company in New York, Chicago, Los Angeles, Boston, Anchorage, and Philadelphia, copies of

the attached notice marked "Appendix."[42] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondents' authorized representatives, shall be posted by them immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

Dated, Washington, D.C.

May 31, 1972.

EDWARD B. MILLER, Chairman
HOWARD JENKINS, JR., Member
RALPH E. KENNEDY, Member
JOHN A. PENELLO, Member
National Labor Relations Board

MEMBER FANNING, dissenting:

I dissent from my colleagues' holding that Section 8(e) of the Act proscribes certain conduct—i.e., the entering into of hot cargo agreements—by railroads, airlines, the Federal and state Government and their political subdivisions, the Federal Reserve bank, wholly owned Government corporations, and nonprofit hospitals, all of which are excluded

---

[42] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

from the definition of "employer" contained in Section 2(2) of the Act. The language of 8(e) is itself clearly contrary to this holding for it states in pertinent part "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement . . . whereby such employer ceases or refrains or agrees to cease or refrain from . . . dealing in the products of any other employer, or to cease doing business with any other person." The legislative history of 8(e) and of the 1959 amendments to the secondary boycott provisions of the Taft-Hartley Act demonstrate, moreover, that Congress clearly understood that by the use of the words "any employer" in 8(e) they were limiting the jurisdictional reach of the section to employers as defined in Section 2(2).

As the majority opinion herein makes clear, Section 8(e) and 8(b)(4)(A) and (B) were the end results of efforts to amend Section 8(b)(4)(A) of the Taft-Hartley Act to expand the secondary boycott prohibitions to include restraint and coercion of employers, inducement of individuals employed by any person, and to the entering into and enforcement of hot cargo contracts. The purpose of the amendments was explained by Senators Goldwater and Dirksen in their minority report on S. 1555:

> The major loopholes in the present ban on secondary boycotts are:
>
> (1) *Coercion of employers*—Present law makes it an unfair labor practice for a union or its agents to urge the employees of an employer to refuse to perform work for the purposes of compelling their employer to cease doing business with some other person. This provides the biggest loophole in present law. The prohibition is against the threatening or urging of the "employees" of the other employer. Nothing is said about urging or persuading the employer of the secondary employees....

The bill, S. 748, meets this problem by amending section 8(b)(4) of the present law to make the restriction apply to "threaten, coerce or restrain any person engaged in commerce . . ." as well as "induce or encourage any individual employed by any person."

(2) *Hot-cargo clauses*—It has become common to find clauses in union contracts whereby the employer agrees not to handle what the union chooses to call "hot goods," "unfair materials," and "blacklisted products." . . .

* * * * * * * * *

S. 748 makes it an unfair labor practice for a union to coerce an employer to enter into such an agreement, or having entered into it, for a union to coerce the employer to live up to it, or to induce his employees to take economic action to force the employer to live up to it. Only the latter is now lawful under the Taft-Hartley Act.

(3) *Boycotts by railroad employees, agricultural workers, Government employees, and other groups now excluded from the secondary boycott ban of the Taft-Hartley Act.* Under the definition section of the Taft-Hartley Act railroad employees, agricultural workers, and governmental employees are not employees within the meaning of the act. The Board has reached the conclusion that secondary boycotts by these exempt categories, and the inducement of such boycotts are not unfair labor practices. (See *International Rice Milling*, 84 NLRB 360, and *Di Giorgio Wines*, 87 NLRB No. 125.)

Secondary boycotts by these groups are just as much against the public interest as boycotts by anyone else.

The bill, S. 748, would extend the ban to these excluded categories by use of the words "any person"

> instead of the use of the words "employees of any employer" in section 8(b)(4)(i) and (ii).[43]

After S. 748 was introduced on the Senate floor, Senator Goldwater explained:

> The word "person" is used in the proposed amendment to the secondary boycott provision rather than "employer," in order to extend the protection of the secondary boycott provisions of the act to public employers, railroads, or agricultural enterprises without subjecting them to other provisions of the act.[44]

---

[43] I Leg. Hist. 475-476. My colleagues omit the last paragraph of the quoted excerpt. See also Senator Goldwater's extension of remarks in the Congressional Record for October 2, 1959, II Leg. Hist. 1858. In fn. 37 of the majority opinion, my colleagues quote from another extension of remarks by Senator Goldwater to the effect that "Now the term 'employer' is actually employer in its dictionary sense." Since they emphasize that passage, they must regard it as significant. The passage comes from an interview with a staff member of the Senate Labor Committee reported in a news magazine. Though Senator Goldwater obviously thought the interview aided an understanding of the amendments to the Act then recently passed by Congress, such views hardly constitute authoritative legislative history as to the precise meaning of statutory language. However that may be, one should use the whole of the relevant material. The record will show that immediately before the statement quoted by my colleagues, the staff member stated:

> The term "employer" as it is defined in the Taft-Hartley Act excludes certain types of employers. Among them, the most important being railroad employers and their employees, because they are covered under the Railway Labor Act.
>
> * * * * *
>
> Now, under this new bill, instead of using the term, "to cease doing business with another employer," it says "to cease doing business with any other person." Person includes everybody. That closes that loophole. [II Leg. Hist. 1829.]

[44] II Leg. Hist. 1079.

Although my colleagues quote from the same passages, they omit the explanation in the minority report and by Senator Goldwater on the floor of the Senate that the objectives sought to be achieved were to be achieved by the elimination of the words "employees of any employer" and "employer" and the use instead of the words "individuals employed by any person" and "person." It is apparent that the sponsors of S. 748 were clear in their mind that the retention of the words "any employer" would not achieve their objective of proscribing boycotts and the inducement of boycotts of employees in industries exempted from the coverage of the Act either by exclusion of the employing entity from the definition of "employer" in Section 2(2) of the Act or by exclusion of the workers from the definition of "employee" in Section 2(3) of the Act. The sponsors of the legislation in effect rejected the rationale of the decision in *International Rice Milling Co., Inc.* v. *N.L.R.B.*,[45] in which the court of appeals construed the words "any employer" in Section 8(b)(4)(A) of the Taft-Hartley Act to embrace "the class of employers as a whole, and not merely those within the definition of 'employer' ",[46] and in effect ratified the Board's *International Rice Milling*[47] holding that the Taft-Hartley Act's secondary boycott provisions were not couched in language broad enough to reach the conduct in question. To rectify the situation created by the limiting language of the Taft-Hartley Act, Congress amended the Act by the use of broader language.

Moreover, there is persuasive evidence in the language of Section 8(b)(4) itself to indicate that the 1959 amendments were not intended to give a broader reach to the words "any employer." In addition to the cease doing business

---

[45] 183 F.2d 21 (C.A. 5).

[46] *Id.* at 25.

[47] 84 NLRB 360.

objective of Section 8(b)(4)(B), that section proscribes "forcing or requiring *any other employer* [emphasis supplied] to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9." Section 8(b)(4)(C) proscribes "forcing or requiring *any employer* [emphasis supplied] to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9." Section 8(b)(4)(D) proscribes "forcing or requiring *any employer* [emphasis supplied] to assign particular work to employees in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless *such employer* [emphasis supplied] is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work." Manifestly the words "any other employer" and "any employer" appearing in those subsections of Section 8(b)(4) are limited to "employer" as defined in Section 2(2) for those are the only employers for whose employees a labor organization can become a certified representative under Section 9. Those provisions with their use of the words "any employer" remain the same today as before the 1959 amendments, and it can hardly be supposed that merely because Congress saw fit to close loopholes in the secondary boycott provisions of the Act to reach inducement of "any individual employed by any person" and to proscribe threats, coercion, and restraint of "any person engaged in commerce or in an industry affecting commerce" that it changed the meaning of the words "any employer" in those provisions to mean any person or to mean employer in the generic sense. This must necessarily be so, for if it is not, then the words "an employer" in Section 9(c)(1)(B) must be read as embracing "the class of employers as a

whole, and not merely those within the definition of 'employer'." Then, too, the words "any employer" in Section 8(b)(7) must be given the broader reach. Clearly a construction which gives operative words a meaning other than the carefully drawn statutory definition and which has such far reaching consequences carries a heavy burden of proof that that is what Congress intended. That burden has not been met here as is shown conclusively by the provisions of 8(b)(4)(A).

Section 8(b)(4)(A) proscribes forcing or requiring "any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by Section 8(e)." It is significant that the words "any employer" were not introduced into Section 8(b)(4)(A) after the addition of Section 8(e). S. 748, which contained no 8(e) provision—though it did contain a provision in 8(b)(4)(B) proscribing "forcing or requiring any person . . . to agree to cease doing business with any other person"—also contained a provision in 8(b)(4)(A) proscribing "forcing or requiring any employer or self-employed person to join any labor or employer organization." These words were of course part of former 8(b)(4)(A), and it is obvious that they were used then in the statutory definition sense. It follows that when Congress amended 8(b)(4)(A) by adding after the words "employer organization" the words "or to enter into any agreement which is prohibited by Section 8(e)" it did not intend to give a broader meaning to the words "any employer."

Of course, the history of 8(e) follows the same course. As set forth in the majority opinion, herein, Senator Gore introduced an amendment limiting the ban on entering into hot cargo clauses to agreements between labor organizations and "any employer who is a common carrier subject to Part II of the Interstate Commerce Act." Here the words "any employer" are limited in scope to common carriers subject to part II of the Interstate Commerce Act, and there

is no room for any argument in this first version of 8(e) that they were intended to mean employer in the generic sense. The Landrum-Griffin bill as it passed the House, however, contained the provisions of 8(e) as finally enacted by adoption of the conference bill, except for the special provisos for the building and construction and the garment industries which were added in conference. The legislative history of that provsion reveals no statements by proponents explaining that the coverage of the section would extend to railroads, airlines, and other exempt employers. Careful examination of the remarks of Representative Landrum and Griffin and Senator Kennedy quoted by the majority reveals that their references to railroads and other exempt employers were with respect to the coverage of 8(b)(4)(B). Though they agreed that the proposed limited ban on hot cargo clauses was too narrow, and should extend to all employers, none of them contended that elimination of the limiting clause "common carriers subject to Part II of the Interstate Commerce Act" would subject exempt employers to the proscriptions of the Act as well as give them protection from secondary boycotts. Representative of the explanations of congressional intention are Senator Goldwater's remarks entered into the Congressional Record on October 2, 1959. In the same memorandum in which he analyzed the amendments to 8(b)(4)(i) and (ii)(B) referred to earlier, Senator Goldwater described the reach of Section 8(e) as enacted:

> Neither the Kennedy-Ervin bill (S. 505) as introduced, nor the committee bill as reported to the Senate, contained any provision dealing with "hot cargo" agreements. In committee my rejected amendment on secondary boycotts contained a provision outlawing such agreements. On the floor, the Senate adopted an amendment outlawing "hot cargo" agreements only where they were between labor unions and employers who are common carriers subject to part II of the Interstate Commerce Act. This was designed to get at Jimmy Hoffa and the Teamsters Union exclusively. But it failed to do even that.

> Common carriers subject to part II of the Interstate Commerce Act represent only a part of the jurisdiction of the Teamsters Union. Other carriers and transportation enterprises not under part II of that act also employ members of and bargain collectively with the Teamsters Union. This is also true of the warehousing industry, the storage industry, and some segments of the retailing and wholesaling industries. "Hot cargo" agreements in these industries, involving mainly the Teamsters Union, would have been unaffected by the provision in the Senate passed bill.
>
> The basic ban on "hot cargo" agreements in the new section 8(e), as described above, is contained in the Landrum-Griffin bill, and with the exemptions and modifications described above, was accepted by the Conferees.[48]

Internally, Section 8(e) supports the conclusion that "employer" as used in 8(e) does not mean "person." Section 8(e) uses both the words "any employer" and "any other person." The unfair labor practice is "entering into any contract or agreement" by "any labor organization and any employer . . . whereby such employer ceases or refrains or agrees to cease or refrain from handling . . . or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person. . . ." If the words "any employer" are to be construed as "person" as my colleagues conclude, then so must the words "any other employer" be construed as "any other person." If that is a proper construction then the last phrase "or to cease doing business with any other person" is sheer surplusage. If, however, the section is construed to give both terms their statutorily defined meaning, the last clause has a legislative purpose, for it expands the scope of the unfair labor practice to include agreements whereby an employer ceases doing business with not only "any other employer" but with "any other person."

---

[48] II Leg. Hist. 1858.

Nor do I regard the conference committee's action of striking the words "or agree to cease" from 8(b)(4)(i) and (ii)(B) of the House bill in order to avoid a duplication of language contained in the restrictions against entering into hot cargo agreements as a sufficient basis for disregarding the literal language of those sections. In the first place, such language did clearly duplicate the restrictions imposed by 8(b)(4)(A) and 8(e). The fact that the clause may have had a slightly broader reach—it would have explicitly precluded a union from bringing (i) and (ii) pressure against a "person" to force or require that person to agree to cease doing business with another person, whereas 8(b)(4)(A) only proscribes such pressures when the object is to force an employer to agree to cease doing business with a person—is hardly a sufficient basis for finding that Congress intended to prohibit exempt employers from voluntarily entering into such agreements. Moreover, it is not even clear that elimination of the clause would preclude a finding of unfair labor practices against a union which sought to force a person *to agree to cease* doing business with another person. For certainly any strike that has the objective of forcing a person to sign such an agreement also has as an object forcing the cessation of the existing business relationship, an object which is proscribed by the present language of 8(b)(4)(B).

Finally, my colleagues' reliance on the language of the *National Woodwork*[49] decision of the Supreme Court is not helpful to their case. For it is obvious that the Court was speaking there of the substantive correlation between the two sections and not of their jurisdictional reach. More in point to the question before us is the Court's statement in *Railroad Trainmen*[50] that Section 8(e) did not reach purely

---

[49] *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612.

[50] *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369.

railroad labor disputes. For if the words "any employer" as used in 8(e) are to be read as "any person" in order to subject an exempt employer to the prohibitions of that section, they must necessarily be so construed in all cases, and the words "any labor organization" must also be construed to reach the class of labor organizations as a whole. There is no halfway house on the broad construction road my colleagues would travel. Either 8(e) applies to all agreements betwen all unions and employers or it applies only to those agreements between statutory labor organizations and statutory employers. I am convinced that it is the latter construction that is correct.

Dated, Washington, D.C.

May 31, 1972

JOHN H. FANNING, Member
National Labor Relations Board

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT enter into, maintain in effect, give effect to, or enforce any contract or agreement, express or implied, between Lufthansa German Airlines and International Association of Machinists & Aerospace Workers, AFL-CIO, whereby Lufthansa German Airlines ceases or refrains or agrees to cease or refrain from doing business with Marriott In-Flite Services, Division of Marriott Corporation, in violation of Section 8(e) of the Act.

WE WILL NOT enforce or maintain in effect the memorandum of understanding contained in the collective-bargaining agreement signed by Lufthansa German Airlines and International Association of Machinists & Aerospace Workers, AFL-CIO, on February 12, 1971, insofar as it requires Lufthansa to cease doing business with Marriott.

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS,
AFL-CIO
(Labor Organization)

Dated By
(Representative) (Title)

LUFTHANSA GERMAN AIRLINES
(Employer)

Dated By
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 12100, 11000 Wilshire Boulevard, Los Angeles, California 90024, Telephone 213—824-7351.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-1990

MARRIOTT CORPORATION, *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 72-2129

INTERNATIONAL ASSN. OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 72-2207

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

LUFTHANSA GERMAN AIRLINES, *Respondent.*

[January 9, 1974]

On Petitions for Review and Cross-Application for Enforcement and on Application for Enforcement of an Order of the National Labor Relations Board.

Before: TRASK and GOODWIN, Circuit Judges, and THOMPSON,* District Judge.

GOODWIN, Circuit Judge:

The National Labor Relations Board seeks enforcement of an order vitiating a "hot cargo" agreement between an airline-employer subject to the Railway Labor Act, 45 U.S.C. § 151 et seq., and a union representing catering em-

* The Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

ployees. In the companion case, the food-service contractor injured by the boycott seeks damages. The administrative decision is reported as *Machinists Union*, 197 N.L.R.B. No. 18, 80 L.R.R.M. 1305 (May 31, 1972).

The Marriott Corporation alleged unfair labor practices under § 8(e) of the Labor-Management Relations Act (LMRA), 1947, 29 U.S.C. § 158(e),[1] by Lufthansa German Airlines and the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM), the exclusive collective-bargaining representative of Lufthansa's catering employees. IAM appeals the NLRB ruling which found an unfair labor practice, and the Board petitions for enforcement of its order against both IAM and Lufthansa.

I. Jurisdiction

The jurisdiction of the NLRB was asserted under §§ 8(e) and 10(a) of the LMRA, 29 U.S.C. §§ 158(e) and 160(a). The union contends that the Board has no jurisdiction because one party to the challenged contract is a regulated carrier under the Railway Labor Act.

Since 1961, Lufthansa has recognized IAM as the exclusive bargaining representative for all Lufthansa em-

---

[1] This section was added to the Act in 1959, and, in relevant part, provides:

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void * * *."

Section 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B), forbids a labor organization to cause any individual employed by any person to engage in certain conduct designed to force or require any person to cease doing business with any other person.

ployees engaged in its food catering department. Lufthansa has employed its own catering crews in New York City, and has contracted for catering services at other airports from which it operates. This practice was reflected in collective-bargaining agreements executed by Lufthansa and IAM for the years 1964-70. As of 1969, Lufthansa had contracts with Marriott, a nonunion caterer, for Chicago and Los Angeles food service, and was discussing a contract for certain John F. Kennedy Airport catering services. IAM voiced its disapproval of Lufthansa's contracts with a nonunion caterer, and eventually, in 1971, Lufthansa and IAM executed a renewal collective-bargaining agreement containing a provision which in effect required Lufthansa to cease doing business with Marriott and to contract only with union caterers. When Lufthansa informed Marriott that the airline would have to terminate the Los Angeles and Chicago contracts, Marriott instituted these proceedings.

For the purposes of the LMRA, a "labor organization" is defined in terms of its function as between "employees" and "employers," 29 U.S.C. § 152(5), and "employees" and "employers" are defined, in relevant part, as not including "any person subject to the Railway Labor Act." 29 U.S.C. §§ 152(2), (3). Lufthansa is a carrier by air within the meaning of § 201 of the Railway Labor Act, 45 U.S.C. § 181, and therefore, is not an employer within the meaning of § 2(2) of the Labor-Management Relations Act.

Based upon its findings that 88 percent of IAM's members are employees within the meaning of § 2(3) of the LMRA, and that more than 96 per cent of IAM's collective-bargaining agreements are with employers within the meaning of § 2(2) of the Act, the Board concluded that IAM is a labor organization within the meaning of § 2(5) of the Act. The Board further found that the IAM-Lufthansa agreement was primarily aimed at Marriott and Marriott's status as a nonunion caterer, and was not for the purpose of preserving work for unit employees, and therefore consti-

tuted an unlawful hot-cargo agreement. *See Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612 (1967).

Because the findings made by the Board were supported by substantial evidence, and because the inferences drawn by the Board were reasonable, we have no basis to deny enforcement of the Board's order. *See ICC* v. *Louisville & N.R.R.*, 227 U.S. 88, 94 (1913); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490 (1951); *NLRB* v. *Winkel Motors, Inc.*, 443 F.2d 38 (9th Cir. 1971); *NLRB* v. *Millmen & Cabinet Makers, Local 550*, 367 F.2d 953 (9th Cir. 1966).

The Board was required to decide whether Congress, in enacting § 8(e) of the LMRA, intended to outlaw hot-cargo agreements only when they were executed by statutory "labor organizations" and "employers" or whether, despite the seemingly clear language of the section, Congress intended to enact in § 8(e) a ban on hot-cargo agreements as broad as the ban of § 8(b)(4)(B), which applies not merely to any statutory "employer" but to "any person."

The Board, after analyzing the case law[2] and legislative history concluded that the latter, broader interpretation of § 8(e) was correct and that the Board therefore had the power under § 8(e) to rule upon the IAM-Lufthansa agreement. The Board found support for this conclusion in the fact that this case involved not a "pure and simple" dispute between an air carrier and its employees' union over the terms and conditions of the airline employees' employment, but rather a dispute between the air carrier and the union, on the one hand, and a non-carrier (Marriott) and on the other, with regard to employment conditions affecting non-carrier employees. *Cf. Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 377 (1969); *Teamsters Union* v. *New York, N.H. & H.R. Co.*, 350 U.S. 155 (1956).

---

[2] *Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612 (1967); *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

We have examined the reasoning of the majority of the Board in light of the statutory language, the related legislative history, and the case law and find it convincing. Whether the issue involves a jurisdictional determination or a substantive application, the experienced judgment of the Board is entitled to great weight on such questions of law and statutory interpretation. *See Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678, 681-82 n.1 (1944); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *NLRB* v. *Retail Clerks Int'l Ass'n*, 243 F.2d 777, 779 n.2 (9th Cir. 1956). The cease-and-desist order is entitled to enforcement.

II. Compensatory Damages and Litigation Costs

Marriott sought from the Board an order requiring the union to pay compensatory damages for lost business and costs of redress. The Board's order failed, without comment, to provide such relief. Section 10(c) of the LMRA, 29 U.S.C. § 160(c), authorizing the Board to enjoin employers and unions from violating the Act and to order them to take affirmative action, has been construed as giving the Board broad authority to create new remedies. *See, e.g., Southern S.S. Co.* v. *NLRB*, 316 U.S. 31, 46 (1942).

Whether and to what extent damages may serve the policies of the Act in a given case is a complex problem for the Board to decide in light of its administrative experience and knowledge. The primary purpose of the Act is to protect the public interest and the policies of the Act by mitigating the effects of the violation and preventing future violations. Compensation, like any other remedy, should be ordered only when it will serve this primary purpose. See, *e.g., UAW* v. *Russell*, 356 U.S. 634, 642-43 (1958).

In this case, the language of § 8(e) at least supports the view that the Board might not have jurisdiction. It was only after resort to the legislative history and careful consideration thereof that the Board settled upon a reading of

that section which rendered the Lufthansa-IAM agreement an unfair labor practice within the Board's jurisdiction. We cannot say, therefore, that the Board abused its discretion in not awarding damages. Accordingly, we do not revise the Board's order. We express no opinion on the power of the Board to award such affirmative relief. *See Lipman Motors* v. *NLRB*, 451 F.2d 823, 828-29 (2d Cir. 1971); *Herald Co.* v. *NLRB*, 444 F.2d 430 (2d Cir.), *cert. denied* 404 U.S. 990 (1971). *Cf. Food Store Employees, Local 347*, 476 F.2d 546 (D.C. Cir. 1973).

In its brief in this court, Marriott has for the first time requested reimbursement for litigation expenses. Section 10(e) of the LMRA, 29 U.S.C. § 160(e), provides that no objection not urged before the Board may be considered by the court unless excused by extraordinary circumstances. Marriott has not shown the necessary extraordinary circumstances to excuse its failure to request costs and attorney fees before the Board. *See NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961); *NLRB* v. *Swain & Morris Constr. Co.*, 431 F.2d 861 (9th Cir. 1970). Therefore, Marriott's request for reimbursement of costs and attorney fees must be denied.

The Board will prepare and submit a judgment enforcing its order.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS FOR THE NORTH CIRCUIT
U.S. COURT OF APPEALS AND POST OFFICE BUILDING
7TH & MISSION STREETS, P.O. BOX 547
SAN FRANCISCO, CALIFORNIA 94101

Re: No. 72-1990, 72-2129, 72-2207 MARRIOTT CORPORATION VS. NLRB, INTERNATIONAL ASSN. OF MACHINIST ETC. & LUFTHANSA GERMAN AIRLINES ETC.

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered *1-9-74* enforcing the judgment or order of the court below (or administrative agency). The Board will prepare & submit a judgment enforcing its order.

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 72-1990

NLRB # 31CE 28

MARRIOTT CORPORATION, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 72-2129

INTERNATIONAL ASSN. OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 72-2207

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

LUFTHANSA GERMAN AIRLINES, *Respondent.*

Before TRASK and GOODWIN, Circuit Judges, and THOMPSON,* District Judge.

Filed February 7, 1974

Order

The Petition for rehearing filed by petitioner International Assn. of Machinists & Aerospace Workers, AFL-CIO, January 23, 1974, is

DENIED.

---

* The Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

[Same Case]

Judgment

Filed April 19, 1974

Before: Trask and Goodwin, Circuit Judges, and Thompson,* District Judge.

This Cause came on to be heard upon petitions to review, cross-application and application for enforcement of an order of the National Labor Relations Board issued on May 31, 1972, against International Association of Machinists & Aerospace Workers, AFL-CIO, its officers, agents, and representatives, and Lufthansa German Airlines, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on November 6, 1973, and has considered the briefs and transcript of record filed in this cause. On January 9, 1974, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order. In conformity therewith, it is hereby

Ordered and Adjudged by the Court that International Association of Machinists & Aerospace Workers, AFL-CIO, its officers, agents, and representatives, and Lufthansa German Airlines, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining in effect, giving effect to, or enforcing a memorandum of understanding contained in a collective-bargaining agreement entered into by the between Respondent International Association of Machinists & Aerospace Workers, AFL-CIO, and Respondent Lufthansa German Airlines on or about February 12, 1971, whereby Respondent Lufthansa German Airlines ceased or refrained or agreed to cease or refrain from doing business with

* The Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

Marriott In-Flite Services, Division of Marriott Corporation.

(b) Entering into, enforcing, or giving effect to any other contract or agreement, express or implied, whereby Respondent Lufthansa German Airlines ceases or refrains or agrees to cease or refrain from doing business with Marriott In-Flite Services, Division of Marriott Corporation.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the National Labor Relations Act:

(a) Post at the business offices and meeting halls of the aforesaid Union, and at the catering department facilities of the aforesaid Company in New York, Chicago, Los Angeles, Boston, Anchorage, and Philadelphia, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 31, (Los Angeles, California), after being duly signed by Respondents' authorized representatives, shall be posted by them immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Respondents have taken to comply herewith.

Endorsed, Judgment Filed and Entered

April 19, 1974

/s/ Emil E. Melfi, Jr.
Emil E. Melfi, Jr.
Chief Deputy and Acting Clerk

[The Notice to be posted has not been reprinted. It is identical with the Notice at p. 34a *supra*, except that it states that it is "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of The National Labor Relations Board."]

INDEX

	Page
QUESTION PRESENTED	2
STATEMENT	2
I. THE PARTIES	2
II. BACKGROUND OF THE DISPUTE	3
III. THE DISPUTE	4
ARGUMENT	7
CONCLUSION	13

AUTHORITIES CITED

CASES:

Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 377 (1969) 8, 15

International Brotherhood of Electrical Workers v. N.L.R.B., 350 F.2d 791 (D.C. Cir. 1965), Cert. denied 383 U.S. 943 (1966) 8

Local Union No. 25 Teamsters v. N. Y. New Haven & Hartford R.R. Co., 350 U.S. 155, (1956) ... 14, 15, 16

N.L.R.B. v. Servette, Inc., 377 U.S. 46 (1964) 10, 11

National Woodwork Mfrs. Assn. v. N.L.R.B., 386 U.S. 612-621 (1967) 9

United Steelworkers v. N.L.R.B., 376 U.S. 492, 501 (1964) 16

STATUTES:

National Labor Relations Act, 28 U.S.C. § 151:

§ 2(2) 3, 12, 15

§ 2(5) 3, 8

§ 8(b) (4) (A) 9

Page

§ 8(b)(4)(B) 9, 10, 11, 12, 13, 14, 15

§ 8 (e) 2, 6, 7, 8, 9, 10, 11, 12, 13

Railway Labor Act, 45 U.S.C. §§ 151-188, as amended, 49 Stat. 1189, 45 U.S.C. § 181 2

LEGISLATIVE MATERIALS:

105 Cong. Rec. 5633, II 1959 Leg. Hist. 1052 ..... 12, 13

105 Cong. Rec. 13091-92, II 1959 Leg. Hist. 1522-23 .. 10

105 Cong. Rec. 14195, II 1959 Leg. Hist. 1568 12

105 Cong. Rec. 14343, II 1959 Leg. Hist. 1518 10

105 Cong. Rec. 14347, II 1959 Leg. Hist. 1522-1523 ... 9

105 Cong. Rec. 14519-14541, II 1959 Leg. Hist. 1691-1702 10

105 Cong. Rec. 15220-23, II 1959 Leg. Hist. 1706-1709 10

105 Cong. Rec. 16435, 16653-54, II 1959 Leg. Hist. 1452-1453, 1738-1739 11

105 Cong. Rec. 16539, II 1959 Leg. Hist. 1912 13

H.R. 8400, Section 705, I 1959 Leg. Hist. 680-683 .. 9, 10

H.R. 8400, Section 705(a), I 1959 Leg. Hist. 680-681 .. 10

H.R. Rep. No. 741, 86th Congress, 1st Session, 99-100, I 1959 Leg. Hist. 857-858 9

H. Conf. Rep. No. 1147 on S. 1555, 86th Cong., 1st Session, 38-40, I 1959 Leg. Hist. 942-944 11

Senator Goldwater, Section 8(e), II 1959 Leg. Hist., 1829 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1642

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT MARRIOTT CORPORATION BRIEF IN OPPOSITION

Marriott Corporation prays that petition for certiorari be denied in this case.

All references to the Transcript of Record will be designated: (R.T. (page)). All references to the Decision of the N.L.R.B. will be designated: (Bd. (page)). All references to the Petition for Writ of Certiorari will be designated: (Pet. (page)).

QUESTION PRESENTED

Whether International Association of Machinists and Aerospace Workers; AFL-CIO, (I.A.M.), Petitioner herein, and Lufthansa German Airlines violated Section 8(e) of the National Labor Relations Act, as amended,[1] (N.L.R.A.), by entering into and maintaining a "hot cargo" agreement which required Lufthansa to virtually cease doing business with Marriott In-Flite Services, a Division of Marriott Corporation.

STATEMENT

I. The Parties

Lufthansa German Airlines is a corporation existing under the laws of the Federal Republic of Germany. (R.T. 34) It is in the business of providing air transportation of goods and passengers to and from points within the United States and other countries. As such, it is a "carrier by air" within the meaning of §201 of the Railway Labor Act.[2]

Marriott In-Flite Services, a Division of Marriott Corp., is a Delaware corporation engaged in providing catering services for various airlines operating out of cities within the continental United States. These services consist of the preparation, production and loading of food and beverages to be consumed by passengers during the flight. (R.T. 35, 38)

[1] 29 U.S.C. § 151 et seq.
[2] 45 U.S.C. § 151 et seq.

It is undisputed that Marriott is an "employer" within the meaning of Sec. 2(2) of the N.L.R.A. Lufthansa is one of the customers for which Marriott provides in-flight food services.

I.A.M. is an organization existing for the purpose of dealing with employers concerning terms and conditions of employment of employees. As such, I.A.M. was found by the N.L.R.B. to be a "labor organization" within the meaning of Section 2(5) of the N.L.R.A.

2. Background of the Dispute

As part of its operations within the United States, Lufthansa has maintained a catering facility at Kennedy International Airport in New York City, New York, since 1959. This facility prepares part of the food served to passengers on Lufthansa flights from Kennedy. (R.T. 36)

This catering facility at Kennedy is the only one maintained by Lufthansa. All catering for flights from other airports has historically been obtained through subcontracting. (R.T. 36)

In 1961, Lufthansa recognized I.A.M. as the exclusive collective bargaining representative of all catering employees — *i.e.*, the Kennedy employees. (Bd. 4). However, because Lufthansa historically had subcontracted most of its catering, both parties consented to the continuation of such practice where:

1) Such work was historically subcontracted;

2) No catering facilities were available;

3) The work load was insufficient to establish catering facilities at that location. (R.T. 225)

Thereafter, up to 1971, each collective bargaining agreement contained this provision as to subcontracting.

Because of these agreements, Lufthansa continued to contract with Marriott for the catering of flights out of Chicago's O'Hare Airport. (R.T. 41) In 1969, Lufthansa became dissatisfied with the catering done by Continental Airlines for Lufthansa flights out of Los Angeles. Therefore, Continental's services were terminated, and Marriott was engaged to provide the Los Angeles catering. (R.T. 36)

3. The Dispute

As a result of the termination of the contract with Continental Airlines, four I.A.M. members lost their jobs. (Bd. 5) Therefore, when contract negotiations between I.A.M. and Lufthansa were opened in 1970, I.A.M. insisted that Lufthansa cease doing business with Marriott at all locations except Boston where the catering service was valued at less than $1,000 per year. (R.T. 37)

Indeed, I.A.M. became quite vehement in its demands that only union caterers be used, with one union representative going so far as to threaten a Lufthansa representative that:

> " . . . if he enjoyed living he had better consider the utilization of union caterers and terminate the

services of non-union caterers[3] like Marriott In-Flite Services." (R.T. 69, 70)

Because of this pressure by I.A.M. to cease doing business with non-union caterers, Lufthansa refused to hire Marriott to service flights of their 747 airplanes out of JFK. Instead, a union caterer was hired, even though Lufthansa had earlier planned on using Marriott's services for these flights. (R.T. 43, 68)

I.A.M. was not content, however, in merely preventint Lufthansa from doing additional business with non-union caterers. It was determined to force Lufthansa to cease doing virtually all business with Marriott.

To this end, I.A.M. pressured Lufthansa into a new collective bargaining agreement and Memorandum of Understanding signed February 12, 1971, whereby Lufthansa agreed to employ certain specified caterers at all locations where Lufthansa did business. (Pet. 9-10)

These specified caterers were all union caterers.[4] The result of this agreement was to cause Lufthansa to cease doing business with Marriott at Chicago and Los Angeles, and therefore, to substitute a union caterer for a non-union caterer upon a demand of I.A.M. (R.T. 37).

[3]Although I.A.M. has earnestly endeavored to represent Marriott's employees (R.T. 60), these employees have consistently elected to have no union representation. (R.T. 37).

[4]Because Marriott was allocated only the Boston catering, valued at less than $1,000.00 per year, for all intents and purposes this provision will be deemed to have not existed.

The ultimate question presented here is whether this agreement violates Section 8(e) of the National Labor Relations Act.

4. Course of Proceedings Below

On March 19, 1971, a charge was filed with the Regional Director for the 31st Region of the National Labor Relations Board by Marriott In-Flite Services, Division of Marriott Corporation (hereinafter called "Marriott"), charging the I.A.M. and Lufthansa with violating Section 8(e) of the N.L.R.A. by reason of the agreement described above.

In a decision dated May 31, 1972, the National Labor Relations Board found that Lufthansa and I.A.M. had violated Sec. 8(e) of the N.L.R.A. Therefore, the Board made an order directing Lufthansa and I.A.M. to cease and desist from giving effect to the "hot cargo" provisions in their present agreement and to refrain from making such contracts in the future.

As a result of this decision, an order was entered on June 9, 1972, by the United States District Court for the Central District of California dissolving a temporary injunction against Lufthansa and I.A.M. obtained by the N.L.R.B. Thereafter, on July 5, 1972, Lufthansa notified the National Labor Relations Board that it did not intend to comply with the Board's order pending this appeal. It should be noted that this is in direct contravention

of Sec. 10(g) of the N.L.R.A., which provided for implementation of the Board's order absent a specific court order staying the Board's order.

Meanwhile, petitions for review of the Board's decision by the Ninth Circuit Court of Appeals were filed by Marriott on June 5, 1972, and by I.A.M. on June 27, 1972.[5] The National Labor Relations Board filed a cross-application for enforcement of its order on July 11, 1972. These cases were then consolidated by the Ninth Circuit upon a motion of all parties.

ARGUMENT

In resolving the question presented herein, the Court must determine the legal issue of whether the National Labor Relations Board has jurisdiction under Section 8(e) of the N.L.R.A. to declare void and unenforceable an agreement between a union which is subject to the N.L.R.A. and an employer which is subject to the Railway Labor Act (for the conduct of its own employer-employee relations) where the agreement was tactically calculated to affect the labor relations of another employer which is subject to and protected by the N.L.R.A.

The real target of the Lufthansa-I.A.M. "hot cargo" agreement was Marriott. The I.A.M. had tried unsuc-

[5]Marriott Corporation sought review of the Board's Order on the ground that it omitted an award of attorney fees and costs requested by Marriott Corporation. Marriott also filed a Supplemental Brief supporting the Board's Order in all other respects.

cessfully to organize Marriott employees prior to the "hot cargo" agreement. (R.T. 59-60)

Petitioner apparently concedes that the Lufthansa-I.A.M. agreement contains "hot cargo" provisions. Its sole defense is that such agreement, not illegal under the Railway Labor Act, is not subject to the N.L.R.A. under Section 8(e).

However, the conflicts, or disputes, involved herein are not pure and simple Railway Labor Act disputes.

It is argued at length by I.A.M. that it is not a "labor organization" within the meaning of Section 2(5) of the N.L.R.A. despite a Circuit Court of Appeals case to the contrary.[6] In so arguing, I.A.M. relies upon the Supreme Court decision in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

> And when the traditional railway labor organizations act on behalf of employees subject to the Railway Labor Act *in a dispute with carriers subject to the Railway Labor Act*, the organizations must be deemed pro tanto, exempt from the Labor Management Relations Act. (394 U.S. at 376) (Emphasis supplied)

In the *Jacksonville Terminal* case, the dispute *was* "a railway labor dispute, pure and simple." 394 U.S. at 377

In the instant case, I.A.M. was engaged in a dispute,

[6] *International Brotherhood of Electrical Workers v. N.L.R.B.*, 350 F.2d 791 (D.C. Cir. 1965), Cert. denied 383 U.S. 943 (1966).

albeit one-sided, with Marriott, who is *not* a carrier subject to the Railway Labor Act. Therefore, this important distinction renders the Supreme Court decision in *Railroad Trainmàn* inapposite.

Petitioner's legislative history arguments are likewise without merit.

I.A.M. juxtaposes Section 8(e) of the N.L.R.A. with Section 8(b)(4)(A) of the same act. The only valid juxtaposition of Section 8(e) is with Section 8(b)(4)(B) of the N.L.R.A.

Because of their disagreement with the House Labor Committee bill, Representatives Landrum and Griffin sponsored a substitute bill with provisions aimed directly at plugging the various loopholes in the secondary boycott law.[7] This bill included a Section 8(e) provision broader than the House bill or the Gore amendment to the Senate bill. As the Supreme Court noted in *National Woodwork Manufacturers Ass'n v. N.L.R.B.*, 386 U.S. 612, 637 (1967).

> The substitute Landrum-Griffin bill, however, expanded the proposal to cover *all industry* and not common carriers alone. H. R. 8400, §705(b) and (1) in I 1959 Leg. Hist. 683. Representative Landrum stated, "I submit if such contracts are bad in one

[7]H. R. REP. NO. 741, 86TH CONG., 1ST SESS. 99-100, in I 1959 LEG. HIST. 857-858 (Additional Views); H. R. 8400, Section 705, in I 1959 LEG. HIST. 680-683. See the analysis of the bill by Representative Griffin, 105 CONG. REC. 14347, in II 1959 LEG. HIST. 1522-1523.

segment of our economy, they are undesirable in all segments." 105 CONG. REC. 14343, II 1959 LEG. HIST. 1518. (Emphasis supplied.)

This bill also sought, under a new Section 8(b) (4) (B), to shield employers, both statutory and non-statutory employers, from strikes or threats aimed at forcing them to agree to hot cargo agreements. This was done by making such conduct illegal where its object was to force or require "any *person* to cease, *or to agree to cease*, using, selling handling, transporting [etc.] . . . the products of any other . . . or to cease, *or agree to cease*, doing business with any other person . . . " (Emphasis supplied)[8] Other loopholes were similarly closed by the language of the revised provision proscribing secondary boycotts.[9] See *N.L.R.B. v. Servette, Inc.*, 377 U.S. 46, 51-54 (1964) for a discussion of the amendments ultimately adopted to close the loopholes.

The House, after lengthy consideration, passed the Landrum-Griffin bill with no change in the language of the Section 8(e) and 8(b) (4) (B) provisions.[10] In Conference Committee, the provisions of the House bill as

[8]H. R. 8400, §705(a), in I 1959 LEG. HIST. 680-681. See Griffin analysis, 105 CONG. REC. 13091-92, in II 1959 LEG. HIST. 1522-1523.

[9]See analyses of the Landrum-Griffin bill by Representative Griffin, 105 CONG. REC. 13091-92, in II 1959 LEG. HIST. 1522-1523 and by Senator Kennedy and Representative Thompson, 105 CONG. REC. 15220-23, in II 1959 LEG. HIST. 1706-1709.

[10]105 CONG. REC. 14519-14541, in II 1959 LEG. HIST. 1691-1702. H. CONF. REP. NO. 1147 on S. 1555, 86TH CONG., 1ST SESS. 38-40, in I 1959 LEG. HIST. 942-944.

to Sections 8(e) and 8(b) (4) (B) were adopted substantially without change, and the Conference Report was agreed to by both houses. 105 CONG. REC. 16435, 16653-54, in II 1959 LEG. HIST. 1452-1453, 1738-1739.

Indeed, the only material change was in the language of §8 (b) (4) (B). The language read "cease, *or agree to cease*, using, selling, etc. . . ." "or to cease *or to agree to cease* doing business with any other person . . . " (Emphasis supplied.) The Conference Committee, after deliberation, concluded that the underlined portions above should be deleted as they were a duplication of the activity proscribed in the new Section 8(e).[11]

Now, this deletion is quite substantial, as it clearly indicates that Congress intended that those persons who were prohibited from engaging in secondary activity under Section 8(b) (4) were *the same persons who were prohibited from entering into voluntary agreements to boycott under Section 8(e).*

It is well settled that, had I.A.M. engaged in a strike to force Lufthansa to cease doing business with Marriott, the Board could order that such activity be ceased as violative of Section 8(b) (4) (B).[12]

The conclusion is inescapable that, had the words "or agree to cease" been left in Section 8(b) (4) (B), a

[11]H. CONG. REP. NO. 1147 on S. 1555, 86TH CONG., 1ST SESS, 38-40, in I 1959 LEG. HIST. 942-944.

[12]N.L.R.B. v. Servette, Inc., 377 U.S. 46 (1964).

voluntary agreement by I.A.M. and Lufthansa to boycott Marriott would be violative of Section 8(b) (4) (B).

However, as was seen above, these words, "or agree to cease" were stricken as being duplicative of the new Section 8(e).

Therefore, it is necessary to read Section 8(e) in conjunction with Section 8(b) (4) (B) in order to determine the identity of those prohibited from both forced and voluntary boycotts. Indeed, the Supreme Court has recognized the close relationship between these two sections.

> "Although the language of § 8(e) is sweeping, it closely tracks that of § 8(b) (4) (A) [now 8(b) (4) (B)] . . . "[13]

Thus, it is clear that a reading of Section 8(e) should treat this section as an extension of Section 8(b) (4) (B). Such a reading results in the conclusion that the word "employer" in Section 8(e) refers to "employer in its dictionary sense,"[14] rather than to "employer" as defined in Section 2(2) of the N.L.R.A.

This conclusion is buttressed by the opinions of key legislators of the 1959 amendments to the N.L.R.A.; 105 CONG. REC. 14195, in II 1959 LEG. HIST 1568 (Rep. Griffin: "Our substitute bill would ban all hot cargo agreements"); 105 CONG. REC. 5633, in II 1959 LEG.

[13]*National Woodwork Mfrs. Assn. v. N.L.R.B.*, 386 U.S. 612-621 (1967)

[14]Senator Goldwater on Section 8(e), II Leg. Hist. 1829.

HIST. 1052 (Sen. McClellan: All "'hot cargo contracts' are absolutely wrong, they should not be tolerated in a free society and a free economy") 105 CONG. REC. 16539, in II 1959 LEG. HIST. 1712 (Rep. Griffin: the conference bill bans all "hot cargo agreements: except for the garment and construction industries").

Since Section 8(e) was adopted for the same purpose as the 8(b) (4) (B) amendments, and its reach was intended to be coextensive with that of 8(b) (4) (B), it is plain that Congress intended 8(e) to cover non-statutory employers as well. Otherwise, Congress must be held to have intended the unreasonable result of creating a loophole in a measure designed to plug a loophole.

More important, there is nothing in the legislative history which indicates any desire on the part of any congressional representative or committee to exclude non-statutory employers from the reach of Section 8(e), or any concerns about including them within the intendment thereof. The absence of any indicia of such congressional intent, in the face of Congress' otherwise clearly expressed intent to provide sweeping protections for all employers against forms of secondary activity, including hot cargo agreements, compels the conclusion that Congress intended to include non-statutory employers within the reach of the hot cargo provision.

CONCLUSION

From the argument above, it is clear that the status

of Lufthansa as a "carrier by air" under the Railway Labor Act does not exempt the present dispute from the jurisdiction of the N.L.R.B. As this Court has explained in *Local Union No. 25 Teamsters v. New York, New Haven & Hartford R.R. Co.*, 350 U.S. 155, 159-161 (1956),

> The Act, in its definition of an "employer," expressly excludes anyone subject to the Railway Labor Act. 61 Stat 137, 29 USC § 152(2). It is of course true that employer-employee relationships of railroads such as respondent are governed by the Railway Labor Act, which was passed before either the National Labor Relations Act or the Labor Management Relations Act. Neither of the latter Acts was intended to tread upon the ground covered by the Railway Labor Act. It is clear that neither railroads nor their employees may carry their grievances with one another to the N.L.R.B. for resolution. But it does not follow from this that a railroad is precluded from seeking the aid of the Board in circumstances unrelated to its employer-employee relations.

It seems elementary that the present dispute does not involve the employer-employee relations of Lufthansa, but rather involves an attempt by I.A.M. to force unionization of non-union employers in the catering industry. Here Lufthansa is the neutral employer, within the usual concepts of secondary boycotts. Thus, Lufthansa is afforded the protection of the N.L.R.A. from strikes to force it to cease doing business with Marriott under Section 8(b) (4) (B) of the N.L.R.A. Likewise, Lufthansa

and Marriott are each afforded the "protection" of the N.L.R.A. against voluntary agreements to boycott Marriott, even though Lufthansa, in the context of the threats of I.A.M., ostensibly prefers to be outside the jurisdiction of the N.L.R.A.

This Court held, *prior to the 1959 amendments*, that the exemption of Railway Labor Act carriers from the N.L.R.A. did not extend to those circumstances where the railroad "occupied the status of a neutral or secondary employer." *Local Union No. 25, Teamsters v. New York, New Haven & Hartford R.R. Co.*, 350 U.S. at 160 (1956).

From the above discussion, it would appear that, even prior to the 1959 amendments, Railway Labor Act employers were subject to the jurisdiction of the N.L.R.B. under certain conditions, despite their exclusion under Section 2(2) of the N.L.R.A. However, any doubt as to their inclusion under the secondary boycott provisions of the N.L.R.A. was resolved by the enactment of Sections 8(b) (4) (B) and 8(e) in 1959.

As was previously established, Railway Labor Act employers are covered by the provisions of Section 8(e) because Congress intended that the words "any employer" contained therein be defined in their dictionary sense. Although I.A.M. agrues vigorously against such a reading, it is obvious that a contrary interpretation would frustrate the Congressional intent.

Contrary to Petitioner's contention (Pet. 25), the Board and the Court of Appeals have not brought the Railway Labor Act and the National Labor Relations Act into collision. The admixture of rights, obligations and protections of the two Acts have been recognized by this Court.[15] The present case presents no deviation from prior decisions of this Court.

The petition should be denied.

Respectfully submitted,

CHARLES A. KOTHE
RICHARD L. BARNES
124 E. 4th Street
Tulsa, Oklahoma 74103

Attorneys for Respondent
Marriott Corporation

---

[15] *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969); *United Steel Workers v. N.L.R.B.*, 376 U.S. 492, 501 (1964); *Local Union No. 25, Teamsters v. New York, New Haven & Hartford R.R. Co.*, 350 U.S. 155 (1956). *Cf. I.B.E.W. v. N.L.R.B.*, 350 F.2d 791 (D.C. Cir. 1965), *Cert denied* 383 U.S. 943 (1966).

INDEX

Page

Opinions below 1
Jurisdiction 1
Question presented 1
Statute involved 2
Statement 3
A. The Board's findings of fact 3
B. The decisions below 6
Argument 7
Conclusion 10

CITATIONS

Cases:

Brotherhood of Railroad Trainmen v. *Jacksonville Terminal Co.*, 394 U.S. 369 9-10

District 9, Int'l Ass'n of Machinists v. *National Labor Relations Board*, 315 F. 2d 33 7-8

Great Northern Railway Co. v. *National Labor Relations Board*, 272 F. 2d 741 9

Int'l Rice Milling Co. v. *National Labor Relations Board*, 183 F. 2d 21, reversed on other grounds, 341 U.S. 665 9

Local Union No. 25, Teamsters v. *N.Y., N.H. & H. R.R. Co.*, 350 U.S. 155 10

Local Union 98, Sheet Metal Workers' Int. Assn. v. *National Labor Relations Board*, 433 F. 2d 1189... 8

Marine Engineers v. *Interlake Steamship Co.*, 370 U.S. 173 8

National Labor Relations Board v. *Joint Council of Teamsters No. 38*, 338 F. 2d 23 8

National Labor Relations Board v. *Milk Drivers' Union, Local 753*, 392 F. 2d 845 8

Cases (Continued): Page

National Labor Relations Board v. *National Maritime Union*, 486 F. 2d 907, certiorari denied, No. 73-1225, April 29, 1974 8

National Woodwork Mfrs. Ass'n v. *National Labor Relations Board*, 386 U.S. 612 7,9

W.T. Smith Lumber Co. v. *National Labor Relations Board*, 246 F. 2d 129 9

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

Section 2(2) 2,6,8
Section 2(3) 8
Section 2(5) 8
Section 8(b)(4) 2-3,6,8,9
Section 8(e) 3,6,7,8,9
Section 10(*l*) 5

Railway Labor Act, Section 201, 49 Stat. 1189, 45 U.S.C. 181 3

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1642

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 35a-40a) is reported at 491 F. 2d 367. The decision and order of the National Labor Relations Board (Pet. App. 1a-34a) are reported at 197 NLRB 232.

JURISDICTION

The final judgment of the court of appeals was entered on April 19, 1974 (Pet. App. 43a-45a). The petition for a writ of certiorari was filed on May 2, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that an agreement between a union and an air carrier prohibiting work from

being contracted out to a non-union employer is a secondary boycott or "hot cargo" agreement proscribed by Section 8(e) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

Section 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include * * * any person subject to the Railway Labor Act, * * *

* * * * *

Section 8 * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *

* * * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: * * *

STATEMENT

A. The Board's Findings of Fact

Lufthansa, a corporation existing under the laws of the Federal Republic of Germany, provides air transportation of passengers and goods to and from points within the United States and other countries (Pet. App. 3a: R. 34).[1] It is a "carrier by air" within the meaning of Section 201 of the Railway Labor Act, 49 Stat. 1189, 45 U.S.C. 181 (Pet. App. 3a; R. 39).

Lufthansa maintains a catering facility at John F. Kennedy ("JFK") Airport in New York City at which it prepares some of the food for its flights from JFK (Pet. App. 3a; R. 36, 75). In 1961, Lufthansa recognized petitioner Union as the exclusive bargaining representative of its catering employees in a unit certified by the National Mediation Board under the Railway Labor Act. The unit encompasses all catering employees working for

[1] "R." refers to the record in the court of appeals.

Lufthansa in the United States, its territories, and Puerto Rico (Pet. App. 3a-4a; R. 36). Lufthansa has employed catering department personnel only at JFK, however, and has contracted out catering services at the other airports from which it operates. Accordingly, in successive collective bargaining agreements, from 1961 to 1971, the Union has waived its jurisdiction over the non-JFK catering (Pet. App. 4a; R. 97, 120).

Pursuant to this arrangement, Lufthansa was able to maintain the contractual relationship with Marriott In-Flite Services it had begun in 1956, for the catering of all Lufthansa flights from Chicago's O'Hare Airport (Pet. App. 4a; R. 36, 74). Marriott was also used by Lufthansa at Boston (Pet. App. 4a; R. 59). In January 1969, when Lufthansa commenced flights from Los Angeles International Airport, it contracted its catering work to Continental Airlines, whose catering service employees were represented by the Union (Pet. App. 4a; R. 75). Also during this period, Lufthansa contracted out its catering service requirements at other airports to various contractors, all of which, except Marriott, were unionized (Pet. App. 4a; R. 37). On November 30, 1969, Lufthansa discontinued the catering service provided by Continental Airlines at Los Angeles International Airport and, effective December 1, 1969, commenced using Marriott for food service for its flights originating at Los Angeles (Pet. App. 4a-5a; R. 67, 76). About the same time, Lufthansa and Marriott discussed the possibility of the latter's providing catering service for Lufthansa's Boeing 747 flights from JFK (Pet. App. 4a-5a; R. 67-68).

In late 1969, Lufthansa and the Union commenced discussions concerning the renewal of the collective bargaining contract covering Lufthansa's catering employees, then due to expire in July 1970 (Pet. App. 5a; R. 55). During these discussions, the Union pressed Lufthansa to sever

its relationship with non-union caterer Marriott and to engage a union caterer to perform the work contracted out to Marriott (Pet. App. 5a; R. 43, 55). Soon thereafter, Lufthansa informed Marriott that the Union had given it three months to find a union caterer in Los Angeles and that the Union unequivocally refused to permit Lufthansa to contract with Marriott for the Boeing 747 flights at JFK (Pet. App. 5a; R. 43, 55, 68-69).

Eventually, on February 12, 1971, Lufthansa and the Union executed a renewal collective bargaining agreement containing, *inter alia*, a memorandum of understanding (No. 6) providing that, at both Los Angeles and Chicago, Lufthansa would replace non-union employer Marriott with a union catering contractor, Chef's Orchid (Pet. App. 5a-7a; R. 37, 45, 59-60, 62-65, 76-77).[2] In early March 1971, Lufthansa informed Marriott that, pursuant to the above memorandum, Lufthansa was required to terminate Marriott's contracts at Los Angeles and Chicago and engage the union caterer named in the memorandum (Pet. App. 7a; R. 71). Accordingly, Lufthansa terminated its arrangements with Marriott in Los Angeles on May 15, 1971, and planned to cancel the Chicago contract on June 1, 1971 (Pet. App. 7a; R. 38, 39; 77-78). At the same time, Lufthansa engaged union caterer Chef's Orchid to replace Marriott at Los Angeles and Chicago and to supplement its operations at JFK (Pet. App. 7a; R. 77-78, 192).

Marriott then filed unfair labor practice charges with the Board's Regional Director, who, pursuant to Section 10(*l*) of the Act, obtained a temporary injunction from

---

[2]The memorandum further provided that, in the event Lufthansa undertakes to perform catering services at other locations, it and the Union would attempt to agree upon a caterer for that location within 60 days. If they did not agree upon "a Union caterer within that period, for reasons of quality, service or price, the company may then select a caterer of its choice." (Pet. App. 6a.)

the United States District Court for the Central District of California, which required reinstatement of the Los Angeles contract and rescission of the notice of cancellation of the Chicago contract (Pet. App. 7a; R. 38, 200-214).

B. The Decisions Below

The Board, one Member dissenting, concluded that the Union and Lufthansa violated Section 8(e) of the Act by entering into and giving effect to the agreement requiring Lufthansa to cease doing business with Marriott and to contract only with union caterers. In reaching this conclusion, the Board found that the Union was primarily concerned with Marriott's status as a non-union caterer and not with preservation of work for the Lufthansa employees whom it represented, especially since the catering work had historically been contracted out except at JFK; Lufthansa's role was therefore that of a neutral bystander in the Union's effort to achieve objectives outside the bargaining unit (Pet. App. 9a).

The Board rejected the contention that Section 8(e) of the Act, which bans secondary or "hot cargo" agreements, was not applicable to the secondary agreement between the Union and Lufthansa because the latter, as an air carrier, is subject to the Railway Labor Act and thus not an employer within the meaning of Section 2(2) of the National Labor Relations Act. The Board held that Congress intended Section 8(e) to have the same scope as Section 8(b)(4)(B), which bans secondary activities, and the latter provision protects "any person," including non-statutory employers, against secondary pressures (Pet. App. 10a-21a). The Board ordered the Union and Lufthansa to cease and desist from maintaining and giving effect to their unlawful agreement (Pet. App. 22a-23a).

The court below enforced the Board's order. It held that there was substantial evidence to support the Board's

factual finding that this case did not involve a dispute between the Union and Lufthansa over the terms and conditions of employment of the latter's employees, buth rather was essentially a dispute between the Union and the non-carrier (Marriott) with regard to matters affecting the latter's employees (Pet. App. 37a-38a). The court also held that the Board was correct in concluding that the protection of Section 8(e) was not limited to employers who are subject to the National Labor Relations Act (Pet. App. 38a-39a).

ARGUMENT

The holding of the court of appeals that Section 8(e) of the National Labor Relations Act proscribing a secondary agreement between a labor organization and a non-statutory employer is correct and not in conflict with other decisions. No issue warranting review is presented.

1. Contrary to the impression the Union seeks to convey (Pet. 15-16), this proceeding does not arise from a dispute between the Union and Lufthansa, but rather from the Union's desire to prevent Marriott, a non-union employer, from doing the catering work for Lufthansa. The Board found, and the court below agreed, that the Union's objective, as reflected in the memorandum of understanding, was not to preserve work for Lufthansa employees, but to insure that employees of any caterer providing services for Lufthansa were represented by a union in dealings with their employer. Since the Union's conduct was not addressed to the labor relations of Lufthansa *vis-a-vis* its own employees but was "tactically calculated to satisfy union objectives elsewhere," the memorandum of understanding was a secondary boycott agreement which ordinarily would be barred by Section 8(e) of the Act. *National Woodwork Mfrs. Ass'n* v. *National Labor Relations Board*, 386 U.S. 612, 644-645; *District 9, Int'l*

Ass'n of Machinists v. *National Labor Relations Board*, 315 F. 2d 33 (C.A. D.C.); *Local Union 98. Sheet Metal Workers' Int. Assn.* v. *National Labor Relations Board*, 433 F. 2d 1189 (C.A. D.C.); *National Labor Relations Board* v. *National Maritime Union*, 486 F. 2d 907 (C.A. 2), certiorari denied, No. 73-1225, April 29, 1974; *National Labor Relations Board* v. *Milk Drivers' Union, Local 753*, 392 F. 2d 845 (C.A. 7); *National Labor Relations Board* v. *Joint Council of Teamsters No. 38*, 338 F. 2d 23 (C.A. 9).

2. The Board correctly concluded that the secondary agreement was not immune from Section 8(e) merely because Lufthansa is not an employer within the meaning of Section 2(2) of the National Labor Relations Act.[3] The term "any employer" used in Section 8(e) need not be read as limited to employers who meet the Section 2(2) definition, but can embrace the class of employers as a whole, if this would best effectuate Congress' objective.

As enacted in 1947, Section 8(b)(4)(A) made it an unfair labor practice for a labor organization to induce or

---

[3]The definition of employer in Section 2(2) excludes "any person subject to the Railway Labor Act," and the definition of employee in Section 2(3) excludes "any individual employed by an employer subject to the Railway Labor Act."

Contrary to the Union's further contention (Pet. 17-18), it is a "labor organization" within the meaning of Sections 8(e) and 2(5) of the Act. The Board found (Pet. App. 3a), and the court below agreed (Pet. App. 37a-38a), that, since approximately 88 percent of the Union's membership are employees within the meaning of Section 2(3) of the Act, and more than 96 percent of the Union's collective bargaining agreements are with employers within the meaning of Section 2(2), it is a labor organization within the meaning of Section 2(5). Section 2(5) defines a labor organization as "any organization of any kind * * * in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." See *Marine Engineers* v. *Interlake Steamship Co.*, 370 U.S. 173, 182-183.

encourage the "employees of any employer" to engage in a strike for an objective of forcing any employer or other person to cease doing business with any other person. Courts of appeals have held that, in view of Congress' intention to protect neutral employers from secondary activity, "employees of any employer" should be construed to include non-statutory employees, such as railroad employees.[4] In 1959, Congress expressed its approval of these rulings by amending Section 8(b)(4)(A) (which was redesignated Section 8(b)(4)(B)) so as to proscribe secondary pressure against "any individual employed by any person."

The legislative history of Section 8(e) (Pet. App. 11a-17a) indicates, as this Court recognized in *National Woodwork*, *supra*, 386 U.S. at 635, that Congress intended Section 8(b)(4)(B) and 8(e) to be coextensive. Moreover, as the Board noted (Pet. App. 18a), "had IAM induced Lufthansa's employees to strike or engage in other concerted activity to force the Company to cease doing business with Marriott, the Union would have violated Section 8(b)(4)(B)." Thus, Congress' objective would be impaired if "a contract executed by IAM and Lufthansa designed to achieve the identical result was not proscribed by Section 8(e)" (Pet. App. 18a-19a).

An interpretation of Section 8(e) embracing this secondary agreement does not interfere with the relationship of employees and employers subject to the Railway Labor Act. Cf. *Brotherhood of Railroad Trainmen* v. *Jacksonville*

---

[4] *Int'l Rice Milling Co.* v. *National Labor Relations Board*, 183 F. 2d 21, 25 (C.A. 5), reversed on other grounds, 341 U.S. 665; *W.T. Smith Lumber Co.* v. *National Labor Relations Board*, 246 F. 2d 129 (C.A. 5); *Great Northern Railway Co.* v. *National Labor Relations Board*, 272 F. 2d 741 (C.A. 9).

Terminal Co., 394 U.S. 369, 377, 391; *Local Union No. 25, Teamsters* v. *N.Y., N.H. & H. R.R. Co.*, 350 U.S. 155, 160. As the Board stated (Pet. App. 20a-21a): "Here, the labor organization involved, IAM, is composed overwhelmingly of nonrailroad or nonairline employees, the dispute is not over the terms and conditions of employment of airline employees, but of employees of an employer, Marriott, which is not subject to the Railway Labor Act * * *."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

ALLISON W. BROWN, JR.,
Attorney,
National Labor Relations Board.

SEPTEMBER 1974.

DOJ-1974-09